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October Term, 1954

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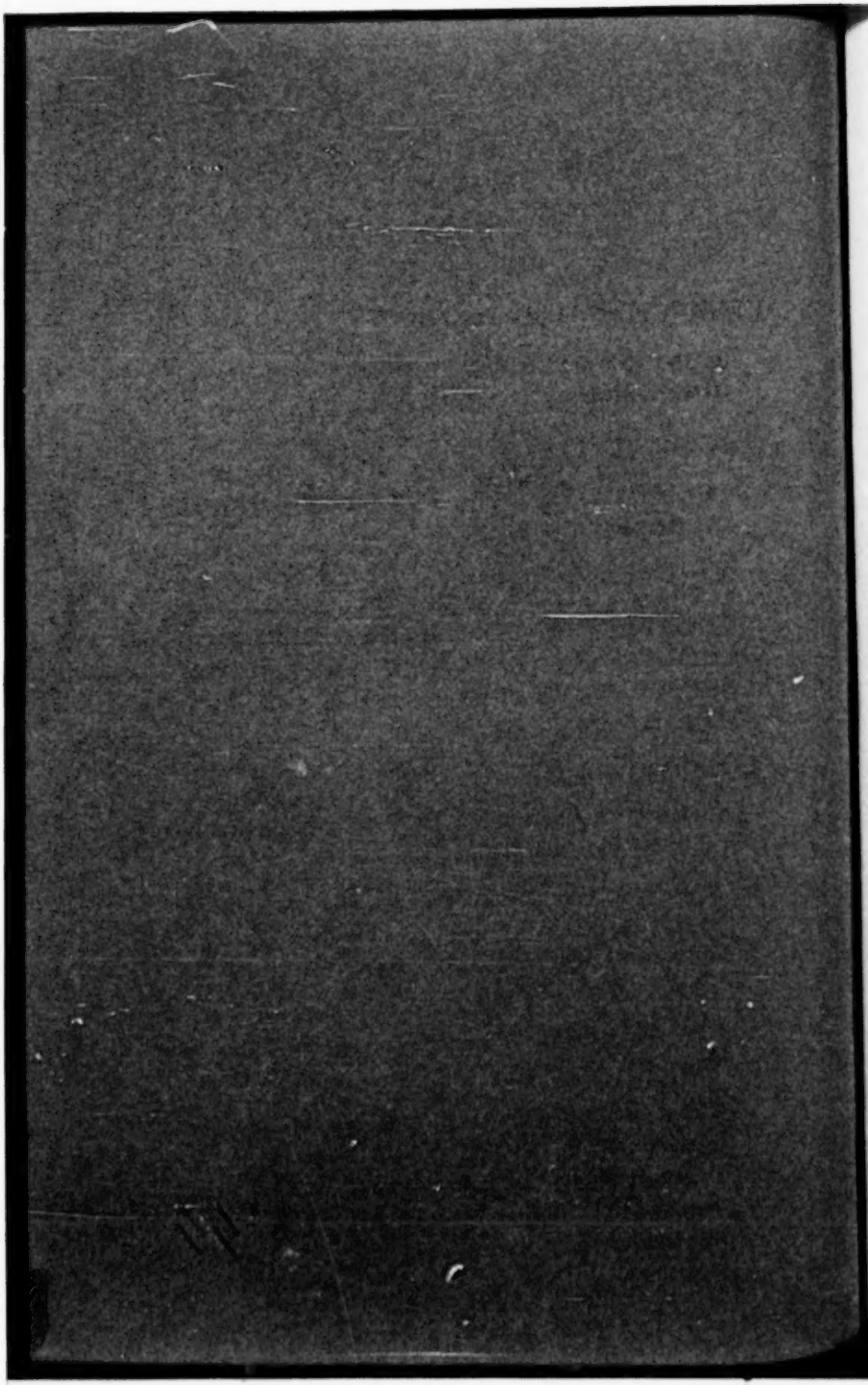
DAVID RINES, individually and as administrator of Estate of Lucy L. Rines, Petitioner to Establish the Truth of Exceptions, APPELLANT.

APPEALS FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

October Term, 1954

Nos. .....

DAVID RINES, individually and as administrator of Estate of Lucy L. Rines, Petitioner to Establish the Truth of Exceptions, APPELLANT.

APPEALS FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

The appellant, David Rines, individually and as administrator of the estate of his wife, Lucy L. Rines, appealing from the two final rescripts or judgments, dated November 5, 1954, of the Full Court of the Supreme Judicial Court for the Commonwealth of Massachusetts, dismissing his two Petitions to Establish the Truth of Exceptions,* numbered, on the docket of the Supreme Judicial Court, No. 11,437 and No. 11,446, submits, under the provisions of Rule 15(3), this single Jurisdictional Statement, to show that the Supreme Court of the United States has jurisdiction of these two appeals and that substantial federal questions are presented.

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* Petitions to Establish the Truth of Exceptions and the procedure relating thereto are described hereinafter.

OPINIONS BELOW IN THESE AND COMPANION CASES

The said two Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,446, were dismissed by the Supreme Judicial Court through the medium of a single opinion and identical rescripts or judgments, dated November 5, 1954, *Rines, petitioner,* Advance Sheets, Opinions of the Supreme Judicial Court, 1954, page 819. The opinion and one of the rescripts or judgments are reproduced herein as Appendix A.

The said two Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,446, are two only of a number of companion Petitions to Establish the Truth of Exceptions that are so related that they should be considered as a unit, in order to obtain a proper background for a study of the present two appeals.

In *Rines v. Justices of the Superior Court,* 330 Mass. 368, 113 N. E. 2d 817, appeals dismissed for the want of a substantial federal question, 346 U. S. 919, rehearing denied, 347 U. S. 908, October Term, 1953, No. 433 and No. 434, the appellant filed motions to supplement the record, in order to add thereto certified copies of the records in the Supreme Judicial Court of two such companion related Petitions to Establish the Truth of Exceptions, numbered, on the docket of the Supreme Judicial Court, No. 11,207 and No. 11,208. These two companion related Petitions to Establish the Truth of Exceptions, No. 11,207 and No. 11,208, were each summarily dismissed, without opinion, by an unreported order, as follows:

> After hearing, petition dismissed on ground that exceptions do not appear meritorious.

There are also before this Court two further companion related Petitions to Establish the Truth of Exceptions,

numbered, on the docket of the Supreme Judicial Court, No. 11,398 and No. 11,399. These, too, the Supreme Judicial Court summarily dismissed, without opinion, by unreported orders, as follows:

No. 11,398

After hearing, the court orders that the petition be, and the same is, hereby dismissed for the reason that exceptions will not lie to action by the judge upon the correctness of a previous bill of exceptions. *Barnett, petitioner,* 240 Mass. 228. *Thorndike, petitioner,* 250 Mass. 408. *Weymouth, petitioner,* 251 Mass. 359, 361-362. *Commonwealth v. Kossowan,* 265 Mass. 436.

No. 11,399

After hearing, the court orders that the petition be, and the same is, hereby dismissed for the reason that the bill of exceptions establishment of which is sought, to wit, plaintiff's so called amended second substitute consolidated bill of exceptions, does not appear to be either an original bill of exceptions or an original bill of exceptions as amended in accordance with any order of the judge. *Graustein, petitioner,* 304 Mass. 679. *Hector v. Boston Electric Light Co.,* 161 Mass. 558, 560-561. *Ryder v. Jenkins,* 163 Mass. 536, 538. See *Thorndike, petitioner,* 257 Mass. 409; *Barnard Manufacturing Co. v. Eugen C. Andres Co.,* 234 Mass. 148.

JURISDICTION

The rescripts or judgments of the Supreme Judicial Court in the said two Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,446, were dated and entered November 5, 1954. Identical petitions for rehearing were denied, without opinion, on February 1, 1955. Notices of Appeal were filed the same day, February 1, 1955.

The jurisdiction of the Supreme Court of the United States to review these dismissals by the Supreme Judicial

Court by direct appeal is conferred by 28 U. S. C., Section 1257(2).

Some of the grounds upon which these appeals are based, if taken alone, would have been more appropriately considered under 28 U. S. C., Section 1257(3). They are proper to be included, however, under the decision of this Court in *Flournoy v. Wiener,* 321 U. S. 253, 263. Separate petitions for certiorari would appear to be unnecessary in view of 28 U. S. C., Section 2103.

The following decisions sustain the jurisdiction of the Supreme Court to review the rescripts or judgments on direct appeal in these cases:

With respect to the repugnancy of a state statute, as applied, to the Constitution of the United States: *Dahnke-Walker Milling Company v. Bondurant,* 257 U. S. 282, 290, *Richfield Oil Corp. v. State Board of Equalization,* 329 U. S. 69, 86, *Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois,* 333 U. S. 203, 206.

A dismissal of a Petition to Establish the Truth of Exceptions constitutes a termination of the litigation both in the Supreme Judicial Court and also the Superior Court. With respect to the finality of the litigation, therefore "there is nothing more to be decided". *Pope v. Atlantic Coast Line Railroad Co.,* 345 U. S. 379, 382.

There were no federal questions involved, as will hereinafter appear, until the said opinion of the Supreme Judicial Court, dated November 5, 1954, itself raised them. The attention of the Supreme Judicial Court was thereupon invited to these federal questions in the said petitions for rehearing. The Chief Justice has signed a Certificate, from which the following is quoted:

Under our practice petitions for rehearing after decisions by this Court are not a recognized part of the proceedings in a case. They are not filed with the clerk and are never in his possession. But as it is always possible for a court to make a mistake or to be led astray by some misapprehension we are willing and anxious that anything of this kind should be brought to our attention and corrected if possible. To this end the Chief Justice will receive a letter addressed to him personally stating the supposed mistake and asking that it be corrected or for a rehearing. This letter is usually short and informal. Applications for rehearing are regarded as matters of grace and not as of right. Argument upon them is not permitted * * * In the cases to which this certificate relates, instead of sending a letter to the Chief Justice in the ordinary way, Mr. Rines presented to the Chief Justice or transmitted to him the formal petition and papers annexed thereto copies of which are hereto attached. These were examined by all the Justices who took part in the original decisions and the following order was rendered upon the petition for rehearing:

"February 1, 1955.

Denied.

STANLEY E. QUA,
Chief Justice".

In view of the fact that, according to the Certificate of the Chief Justice, the Full Court was "willing and anxious" to have brought to its attention, and to correct, if possible, any mistake that it might have made in its said decision of November 5, 1954, or that it had been "led astray by some misapprehension", it should be assumed that, after examining the petitions for rehearing, it concluded that it had made no mistake and had not been led astray by any misapprehension. The denial of the petitions for rehearing, therefore, constituted a direct holding against the appellant's contention that he had been deprived of any of his rights under the Fourteenth Amendment to the Constitu-

tion of the United States. Under these circumstances, it is believed that *Lisenba v. California,* 314 U. S. 219, 222, and not *Consolidated Turnpike Company v. Norfolk & Ocean View Railway Company,* 228 U. S. 326, 333-334, controls. In any event, since the petitions for rehearing provided the appellant with the very first opportunity to invite the attention of the Full Court to the constitutional questions that its own opinion of November 5, 1954, raised, these appeals are governed by *Saunders v. Shaw,* 244 U. S. 317, 320 and *Herndon v. Georgia,* 295 U. S. 441, 444 (see also Mr. Justice Cardozo's dissenting opinion, page 447). The refusal of a state court to decide a constitutional question, furthermore, has the same effect as a definite holding against the claim of unconstitutionality, *Lawrence v. State Tax Commission of Mississippi,* 286 U. S. 276, 282.

It may be also that the following decision is as applicable in connection with the Questions Presented under the new rules of this Court as in connection with the assignments of error under the old: *Johnson v. New York Life Insurance Company,* 187 U. S. 491, 495.

Further decisions bearing on jurisdiction will be cited hereinafter.

THE STATUTES AND THE RULE OF COURT INVOLVED

These two appeals involve the validity, as applied in these cases, of two statutes of the Commonwealth of Massachusetts, chapter 231, sections 113 and 117 of the General Laws, Tercentenary Edition, referred to herein as the first and second statutes, respectively, and Rule 22 of the Rules for the Regulation of Practice before the Full Court of the Commonwealth of Massachusetts. These, together with Rule 74 of the Superior Court, are reproduced herein in Appendix B.

THE QUESTIONS PRESENTED

As these are lengthy, they are quoted, in order not to interrupt the continuity, in Appendix C.

THE STATEMENT OF THE CASE, INCLUDING THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

Introduction

As appears from *Rines v. Justices of the Superior Court, supra,* the appellant, both individually and as administrator of the estate of his wife, Lucy L. Rines, as far back as 1945, entered sixteen actions at law in the Superior Court of the Commonwealth of Massachusetts, against doctors, nurses and a hospital, seeking damages arising out of their malpractices, resulting in the premature death of his wife.

The sixteen actions at law were consolidated for trial and, as so consolidated, were tried to a jury. The trial lasted nineteen days, over a period of three-and-one-half weeks, from January 26 to February 19, 1948, terminating in directed verdicts for the defendants. In several instances, the verdicts were directed after the jury had found for the plaintiff. In other instances, the judge did not permit the cases even to get as far as the jury.

The appellant saved exceptions. The appellant has been unable, however, to complete his litigation in the Superior Court, because the trial judge has refused either to allow or formally to disallow any of four bills of exceptions that have successively been presented to him.

Under the practice in the Commonwealth of Massachusetts, as provided for by the before-mentioned statutes and rules of Court, when a judge of the Superior Court refuses to allow a bill of exceptions, or if he fails either to allow

or to disallow a bill of exceptions, the excepting party may theoretically obtain relief by filing a Petition to Establish the Truth of Exceptions in the Full Court of the Supreme Judicial Court.

This relief, however, is theoretical only. In actual practice, it is rare indeed that a litigant can actually obtain such relief. In the overwhelming majority of instances, the Full Court of the Supreme Judicial Court summarily dismisses the Petition to Establish the Truth of Exceptions, without opportunity to present evidence, and without effective hearing. No litigant ever even considers filing a Petition to Establish the Truth of Exceptions, therefore, except as a last resort; and, in that extremity, he knows beforehand that it is filed almost without any hope whatever of success.

As a practical matter, therefore, the excepting party is denied his theoretical right to trial by jury and, in fact, is deprived of all rights of any kind, if the judge of the Superior Court, after directing a verdict, refuses to allow a bill of exceptions, or fails to take any action at all, either by way of allowance or disallowance of a bill of exceptions.

Petitions to Establish the Truth of Exceptions and the Procedure Relating Thereto

A Petition to Establish the Truth of Exceptions, under the practice in the Commonwealth of Massachusetts, though "in the nature of an appeal to correct an error", *Meehan, petitioner,* 208 Mass. 60, 63, is, in actual fact, an original proceeding, instituted before the Full Court of the Supreme Judicial Court, under the provisions of the before-mentioned second statute, chapter 231, section 117. The purpose of the proceeding (insofar as the present appeals are concerned) is to enable a litigant to complete his litigation in the Superior Court through the medium of a bill of excep-

tions, filed under the provisions of the before-mentioned first statute, chapter 231, section 113, that the judge of the Superior Court has refused to allow, or has failed either to allow or to disallow.

The said first statute, section 113, provides that: first, exceptions to rulings of a judge of the Superior Court, in any civil cause tried by a jury, shall be reduced to writing in a summary manner; secondly, the judge shall examine the exceptions, upon their presentation to him, and after hearing the parties, determine whether they are conformable to the truth; and, thirdly, if the exceptions are conformable to the truth, the judge shall allow them. The said second statute, section 117, provides that, if the judge disallows or fails to sign and return the exceptions, the excepting party may thereupon file a Petition to Establish the Truth of the Exceptions in the Supreme Judicial Court.

Under the provisions of the said Rule 22 of the Rules for the Regulation of Practice before the Full Court, the time for filing a Petition to Establish the Truth of a bill of exceptions is twenty days after notice has been received by the petitioner that the judge of the Superior Court has refused to allow and sign the bill of exceptions. Such notice is provided for by the last sentence of Rule 74 of the Rules of the Superior Court:

> The clerk shall notify the parties of the allowance or disallowance of a bill of exceptions.

Endeavoring to avail himself of the remedy that is theoretically provided by these statutes and rules of Court, the appellant filed the six Petitions to Establish the Truth of Exceptions, Nos. 11,207, 11,208, 11,398, 11,399, 11,437 and 11,446 before mentioned. These six Petitions to Establish

the Truth of Exceptions were all dismissed by the Full Court.

These dismissals were pursuant to a policy that has grown up gradually, over the years, according to which, with greater and greater strictness and severity, a petitioner to establish the truth of exceptions is not afforded any opportunity to present any evidence, and according to which he is not even afforded any hearing, other than that he is permitted to appear before the Full Court for the sole purpose of arguing orally very succinctly, and without any written brief, that he ought to be allowed to present evidence, and to be heard, before a Commissioner. The duty of the Commissioner is to hear the parties for the purpose of determining whether the exceptions conform to the truth and to report accordingly to the Supreme Judicial Court. *Ela v. Cockshott*, 119 Mass. 416.

This is the only kind of so-called hearing that is referred to in the expression, "After hearing", in the orders dismissing the Petitions to Establish the Truth of Exceptions, Nos. 11207, 11208, 11398 and 11399, and it is that same kind of so-called hearing that was accorded the appellant on his Petitions to Establish the Truth of Exceptions, No. 11437 and No. 11446, involved on these two appeals.

As an illustration of the steadily increasing strictness and severity with which petitioners to establish the truth of exceptions are treated, the Full Court originally construed the said statutes and rules with sufficient liberality to permit the petitioners to amend their bills of exceptions, provided only that the Petitions to Establish the Truth of Exceptions were filed in good faith. As the Full Court explained, *Morse v. Woodworth*, 155 Mass. 233, 241, "Otherwise, by an excess of strictness, a party might be deprived of substantial rights". As time progressed, however, the

Full Court began more and more to regret its earlier more liberal holdings until, in *O'Connell, petitioner,* 174 Mass. 253, 256, the Court said that the procedure permitted by this case of *Morse v. Woodworth* "goes to the extreme of liberality in favor of petitioners to prove exceptions" and, in *Squier v. Barnes,* 193 Mass. 21, 24, the Court finally held that it "has no power to allow an amendment of a bill of exceptions".

Of late years, too, the Full Court, on increasingly numerous occasions, has dismissed the Petitions to Establish the Truth of Exceptions summarily, without even the formality of submitting the case to a Commissioner. In *Horan, petitioner,* 207 Mass. 256, 258, for example, the Full Court informed the bar that a Petition to Establish the Truth of Exceptions only "sometimes may be necessary", and that the intention of the statutes and rules is that the excepting party should attempt to obtain the allowance of a bill of exceptions in the Superior Court. The present practice is accordingly well stated in the pronouncement of the Full Court in the said opinion of November 5, 1954:

> A proper bill of exceptions should have been settled in the Superior Court.

Under the present practice, therefore, as is fully illustrated by the present appeals, the Full Court denies a hearing to a petitioner to establish the truth of exceptions for the very reason that the judge of the Superior Court has denied him a hearing.

The orders dismissing the Petitions to Establish the Truth of Exceptions, under this present practice, are usually without opinion, and the only information that the petitioners obtain as to the reason for the denial of their request to be afforded a hearing before a Commissioner is a statement, contained in the orders, to the effect "that ex-

ceptions do not appear meritorious". Attention is invited, for example, to the orders quoted above, dismissing the Petitions to Establish the Truth of Exceptions, No. 11,207 and No. 11,208.

In *Rines v. Justices of the Superior Court, supra,* the Full Court held:

> it is apparent that every alleged error complained of and every contention made could have been raised and presented to this Court by exceptions taken and properly followed up in due course under the provisions of G. L. (Ter. Ed.) c. 231, section 113, as amended by St. 1945, c. 328.

Precisely those same errors and those same contentions, however, though considered to have sufficient merit, after a real hearing, to call forth the opinion of the Full Court, in *Rines v. Justices of the Superior Court, supra,* were nevertheless disposed of, in the orders dismissing the Petitions to Establish the Truth of Exceptions, No. 11,207 and No. 11,208 "on ground that exceptions do not appear meritorious".

How is it possible, however, for exceptions even to "appear meritorious" if the petitioner has not been permitted to present evidence, or even to be heard?

That word "appear" or its equivalent, nevertheless, is found repeatedly in the orders dismissing Petitions to Establish the Truth of Exceptions. It is found, not only, as before stated, in the orders dismissing the Petitions to Establish the Truth of Exceptions, No. 11,207 and No. 11,208, but also in the above-quoted order dismissing the Petition to Establish the Truth of Exceptions, No. 11,399. That word "appear" or its equivalent occurs also, over and over again, in the said opinion of November 5, 1954, dismissing the Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,446, involved on these

appeals. Attention is invited, for example, in addition to the word "appear" or its equivalent, such as the word "seems", and the numerous "If's", to expressions like "It is a matter of serious doubt", "It must be assumed" and "We think it could have been still further reduced", all demonstrating sheer speculation, or even perhaps secret information in the possession of the Full Court, not made of record. If the appellant had been permitted to present evidence, there would have been no need for "serious doubt", assumptions or speculation as to whether "it could" or could not "have been still further reduced".

The increasingly strict and severe rulings of the Full Court were based originally on the assumption that no injustice would be involved in requiring petitioners to settle "a proper bill of exceptions * * * in the Superior Court", because, *Ryder v. Jenkins*, 163 Mass. 536, 538,

> we have no reason to believe that the power of the presiding justice to permit amendments to exceptions by the excepting party is not liberally exercised in all cases where it appears that there has been an attempt in good faith to state all the material evidence.

The Full Court has since forgotten, however, that its belief, on that score, may not, on particular occasions, be justified.

The Proceedings Leading to the Dismissal of the Appellant's Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,446, Involved on These Appeals.

On October 4, 1954, the appellant appeared before the Full Court with the object in view, as prescribed by the above-described practice, of orally presenting briefly an argument as to why he should be permitted to present evidence, and to be heard, before a Commissioner. As appears from pages 27 and 28 of the petitions for rehearing, however, though the appellant got as far as commencing

this brief oral argument, he was not allowed to complete it, because the Full Court orally suspended further argument.

Without even resuming the suspended argument, nevertheless, the Full Court dismissed the said two Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,446. Attention is invited to *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U. S. 292, 300.

In most instances, as already related above, such dismissals are summary, without formal opinion. In the present instance, however, the Full Court did write the before-mentioned opinion, dated November 5, 1954.

The Manner in Which the Federal Questions Were Raised.

The opinion of November 5, 1954, dismissing the Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,446, was a complete surprise. In the first place, several of the rulings contained therein were inconsistent with and contradictory to prior decisions of the Full Court. Secondly, and more important, however, the opinion bristled with constitutional questions, bearing upon both fact and law, with respect to which not only had the appellant never been heard, but also, under the practice in the Commonwealth, as above described, he could not possibly have been heard.

The very first opportunity that was afforded the appellant to invite the attention of the Supreme Judicial Court to these constitutional questions, therefore, was in the petitions for rehearing.

These petitions for rehearing, however, as before stated, were denied, without opinion.

According to the Certificate of the Chief Justice, before mentioned, all the Justices of the Full Court who took part in the said decision of November 5, 1954, examined the petitions for rehearing and joined in the order: "Denied". All the Justices of the Full Court were in agreement, therefore, that the constitutional questions raised in the petitions for rehearing were without merit.

The Appellant Attempted Unsuccessfully to Obtain Relief by the Petitions to Establish the Truth of Exceptions, Nos. 11,398, 11,399, 11,437 and 11,446, and Also by a Petition for a Writ of Mandamus.

It has been stated above that the appellant has presented four bills of exceptions to the said judge of the Superior Court. These were an original bill of exceptions, a first "Substitute Consolidated Bill of Exceptions", a "Second Substitute Consolidated Bill of Exceptions" and an "Amended Second Substitute Consolidated Bill of Exceptions".

The first "Substituted Consolidated Bill of Exceptions" was filed by the appellant of his own volition. This was because, owing to limits of time within which the appellant was required to file the original bill of exceptions, it was not possible for the appellant to prepare it in the form that the appellant desired to have it. The said judge of the Superior Court refused, however, to permit the appellant to substitute the first "Substitute Consolidated Bill of Exceptions" for the original bill of exceptions.

The "Second Substitute Consolidated Bill of Exceptions" and the "Amended Second Substitute Consolidated Bill of Exceptions", however, were filed pursuant to written orders of the said judge of the Superior Court dated, respectively, January 8, 1951 and July 2, 1953. The "Second Substitute

Consolidated Bill of Exceptions" conformed fully to the order, dated January 8, 1951. The "Amended Second Substitute Consolidated Bill of Exceptions" conformed to the order dated July 2, 1953, but not fully, because full compliance with the order of July 2, 1953 would have rendered the "Amended Second Substitute Consolidated Bill of Exceptions" contrary to the truth.

The appellant did not seek review of the refusal of the judge of the Superior Court to permit substitution of the first "Substitute Consolidated Bill of Exceptions" for the original bill of exceptions. This was because, as before stated, the first "Substitute Consolidated Bill of Exceptions" was filed voluntarily.

The appellant did, however, file Petitions to Establish the Truth of Exceptions contained in each of the three others of the four bills of exceptions. No. 11,446 is the number of the Petition to Establish the Truth of Exceptions contained in the original bill of exceptions, No. 11,437 relates similarly to the "Second Substitute Consolidated Bill of Exceptions", and No. 11,399 bears a similar relation to the "Amended Second Substitute Consolidated Bill of Exceptions". The circumstances attending the filing of the Petition to Establish the Truth of Exceptions, No. 11,398, will be described presently.

With the "Second Substitute Consolidated Bill of Exceptions", the appellant filed two motions: one, that the "Second Substitute Consolidated Bill of Exceptions" be substituted for the original bill of exceptions; and the other, that the "Second Substitute Consolidated Bill of Exceptions", after such substitution, be allowed. The said judge of the Superior Court has refused either to grant or to deny either of these two motions, and they are still pending and undisposed of.

At a so-called hearing, on June 29, 1953, however, the said judge of the Superior Court orally ordered the appellant to amend the "Second Substitute Consolidated Bill of Exceptions" by incorporating therein a number of changes demanded by opposing counsel, as to which the appellant had been given advance notice.

The appellant was quite willing to embody in the "Second Substitute Consolidated Bill of Exceptions" such of these demanded changes as conformed to the truth; and, at the said so-called hearing, on June 29, 1953, therefore, he presented to the said judge of the Superior Court an amendment containing such demanded changes. That amendment did not, however, include the remaining demanded changes; and, in explanation thereof, the appellant orally offered evidence to prove that those remaining demanded changes were contrary to the truth and prejudicial to him.

The said judge of the Superior Court refused, however, to receive the said amendment, or even to look at it; he refused also to hear any explanation or, for that matter, to hear the appellant, at all; and he refused further to receive the evidence proving that those of the demanded changes not included in the amendment were prejudicial and not conformable to the truth. Provoked that the appellant should even question the propriety of his order to include those demanded changes, the said judge of the Superior Court thereupon terminated the hearing (if it may be called such), saying that he would embody his said oral order in writing later.

The said judge of the Superior Court then issued his said order of July 2, 1953. This reproduced, in writing, his oral order of June 29, 1953, requiring the appellant to

amend the said "Second Substitute Consolidated Bill of Exceptions" by incorporating therein all the said changes demanded by opposing counsel.

The appellant excepted to this insistance by the judge of the Superior Court that the appellant include in his "Second Substitute Consolidated Bill of Exceptions" changes that were prejudicial to him and that did not conform to the truth. It was in the endeavor to support this exception that the petitioner filed his Petition to Establish the Truth of Exceptions, No. 11,398.

The above facts are stated, under oath, in the said Petition to Establish the Truth of Exceptions, No. 11,398, and also (because the appellant had no other way of presenting these facts to the Full Court, since he was denied the privilege of presenting evidence either before the Full Court itself or before a Commissioner) in identical affidavits of the appellant's attorney, Lester W. Cooch, Esquire, accompanying the petitions for rehearing. Attention is invited particularly to pages 4 to 7 of these affidavits.

The appellant did, however, comply with the said written order of July 2, 1953, insofar as it was possible to do so within the limits of truth. The "Amended Second Substitute Consolidated Bill of Exceptions" contains all the demanded changes except those not conformable to the truth.

Notwithstanding that fact, the said judge of the Superior Court denied a motion by the appellant to allow this "Amended Second Substitute Consolidated Bill of Exceptions". The Petition to Establish the Truth of Exceptions, No. 11,399, was filed in the endeavor to obtain relief from this denial.

The dismissal of the Petitions to Establish the Truth of Exceptions, No. 11,398 and No. 11,399, left the appellant without any remedy whatever, unless it were to be in connection with the remaining two bills of exceptions, namely, the original bill of exceptions or the "Second Substitute Consolidated Bill of Exceptions". The Petitions to Establish the Truth of Exceptions, No. 11,446 and No. 11,437, relating to these remaining two bills of exceptions, however, were also dismissed. They are the two cases that are now before this Court on the present two appeals.

There remained the possibility of still another remedy, and that was to try, by mandamus, to compel the said judge of the Superior Court to take action upon either the "Second Substitute Consolidated Bill of Exceptions" or the "Amended Second Substitute Consolidated Bill of Exceptions". As appears from pages 30 to 32 of the petitions for rehearing (no other opportunity for inviting the attention of the Full Court being afforded the appellant, since he was denied the right to present evidence), the appellant accordingly filed a petition for a writ of mandamus. This came up before a single justice of the Supreme Judicial Court, but that single justice refused even to issue an order of notice.

It may be of interest to note that the reason assigned by the single justice for refusing to issue the order of notice was that the appellant's remedy was, not mandamus, but a Petition to Establish the Truth of Exceptions, under the provisions of the said statutes and rules. This, of course, was directly contrary to the holdings of the Full Court, dismissing the Petitions to Establish the Truth of Exceptions.

The Dismissal of the Petitions to Establish the Truth of Exceptions, No. 11,437 and No. 11,446, Was in Violation of the Fourteenth Amendment to the Constitution of the United States.

The appellant has been driven out of court, both the Superior Court and the Supreme Judicial Court, therefore, without a hearing in either Court, and he is without remedy. Insofar as the Superior Court is concerned, there never was any hearing of any kind upon the original bill of exceptions; and the only hearing on the "Second Substitute Consolidated Bill of Exceptions" occurred on June 29, 1953 when, as before related, the said judge of the Superior Court refused to hear the appellant, at all. The only hearing that occurred in the Supreme Judicial Court, furthermore, was the before-described suspended hearing of October 4, 1954.

Not only has the appellant thus been denied due process of law, moreover, but also, as demonstrated on pages 15-16 of the petitions for rehearing, he has been denied the equal protection of the laws. The appellant is the only litigant, in the whole history of the Commonwealth, for whom a judge of the Superior Court has refused to perform the statutory duty of hearing a litigant upon his original bill of exceptions, and also this is the first time that the Full Court has approved such refusal. For all other litigants, too, a judge of the Superior Court is required to allow or disallow exceptions formally by means of a certificate in writing, signed by him, *C. F. Hovey Company, petitioner*, 254 Mass. 551, 553, *Patterson v. Ciborowski*, 277 Mass. 260, 265, *Gallagher v. Atkins*, 305 Mass. 261, 263-264, and the clerk of the Superior Court, under the provisions of the last sentence of Rule 74 of the Superior Court, as quoted above, is required to notify the parties of such formal

allowance or disallowance. For the appellant, however, the Full Court has now held that it is sufficient if the judge of the Superior Court merely indicates, by implication, "the action which he intended to take", by refusing to take any action at all. As further evidence that the appellant has been denied the equal protection of the laws, for all other litigants, it is sufficient that the bill of exceptions be "reduced to writing in a summary manner", as required by the said statute, section 113, whereas for the appellant alone, the Full Court has now construed the statute to mean that the "Second Substitute Consolidated Bill of Exceptions" should have been reduced to writing in the *most* summary manner: "We think it could have been still further reduced". The discrimination against the appellant is further evident from the fact that the Petition to Establish the Truth of Exceptions, No. 11,399, contained in the "Amended Second Substitute Consolidated Bill of Exceptions", which the said judge of the Superior Court did actually disallow, by formally denying a motion to allow it, suffered the same fate of dismissal, by the Full Court, notwithstanding that it was actually filed within the twenty days provided for by Rule 22 of the Rules for the Regulation of the Practice in the Supreme Judicial Court.

Though the appellant has been permitted to start his said sixteen actions at law, in the Superior Court, he has been denied further access to the Courts of the Commonwealth, in order to complete the litigation, through the medium of a bill of exceptions. The appellant's privileges and immunities, as a citizen of the United States, therefore, have also been abridged.

The Appellant Has Also Been Punished, Without a Hearing, Contrary to Due Process, for Refusing to Obey an Illegal Order of the Judge of the Superior Court.

The dismissal of the Petition to Establish the Truth of Exceptions, No. 11,399, constituted a holding that, when ordered by the said judge of the Superior Court to amend the "Second Substitute Consolidated Bill of Exceptions" so that it shall not conform to the truth, the appellant must comply with that order. The penalty for the appellant's refusal to comply with the said judge's illegal order of July 2, 1953 (insofar only as it was illegal, for the appellant complied fully with that order insofar as it was legal), was to throw him out of court altogether, without hearing him, at all, either in the Superior Court or the Supreme Judicial Court.

This is the same type of punishment, of course, that was disapproved by this Court in *Hovey v. Elliott*, 167 U. S. 409.

The Grounds for the Dismissal of the Petition to Establish the Truth of Exceptions, No. 11,446.

One of the reasons assigned for the dismissal of the Petition to Establish the Truth of Exceptions, No. 11,446, was that, because of the length of the original bill of exceptions, it was not "reduced to writing in a summary manner", as required by the said statute, chapter 231, section 113.

If afforded a hearing, however, the appellant would have offered evidence that the length of the original bill of exceptions was fully justified by the numerous issues (some of which are mentioned on pages 8 to 12 of the petitions for rehearing) raised in sixteen actions at law against numerous defendants. The appellant was compelled to raise all

these issues, at the very outset, in his original bill of exceptions, because he would not have been permitted to add them later, by amendment. *Dorr v. Schenck*, 187 Mass. 542, 543.

The Full Court's ruling that "We think" that the original bill of exceptions "could have been still further reduced" in length, because the appellant found it possible to reduce considerably the length of the "Second Substitute Consolidated Bill of Exceptions" "without loss of effectiveness", was based upon pure speculation. If the appellant had been afforded a hearing, he would have proved that there was considerable "loss of effectiveness" in the "Second Substitute Consolidated Bill of Exceptions". He would have proved that, in the endeavor to shorten the "Second Substitute Consolidated Bill of Exceptions", he had sacrificed many issues, involving much testimony and many exhibits, as well as many exceptions relating thereto, that had been included in the original bill of exceptions, and as to which the appellant had originally hoped to obtain rulings of law.

Bearing upon the criticism of the Full Court relating to the appellant's retaining some (though by no means the greater part) of the testimony, in the original bill of exceptions, in the form of questions and answers, it is pertinent to state that, in order to meet the before-mentioned demands of opposing counsel, supported, as before stated, by the said July 2, 1953, order of the judge of the Superior Court, it became necessary to restore, in the "Amended Second Substitute Consolidated Bill of Exceptions", in question-and-answer form, testimony that, in the "Second Substitute Consolidated Bill of Exceptions", the appellant had tried to put into summary form.

For other litigants (though not for all litigants), furthermore, the Full Court has entertained Petitions to Establish

the Truth of Exceptions that were "needlessly voluminous", and in which "Much of the evidence is set forth by question and answer, when it readily might have been put in narrative form". *Odabashian v. Apsley Rubber Company*, 214 Mass. 66, 68.

The Grounds for the Dismissal of the Petition to Establish the Truth of Exceptions, No. 11,437.

With respect to the Petition to Establish the Truth of Exceptions, No. 11,437, too, the appellant should not have been judged on mere speculation ("It is a matter of serious doubt", "It must be assumed" and "We think"), without a hearing. With regard to the holding of the Full Court, for example, that "We think it could have been still further reduced", if the appellant had been granted a hearing, he would have offered proof (see pages 7-8 of the petitions for rehearing) that the "Second Substitute Consolidated Bill of Exceptions" was drafted with the aid of several experienced and well qualified members of the Massachusetts bar, following well established precedent, and that it would have been impossible to reduce its length further without the sacrifice of still additional testimony and exhibits relating to additional issues and additional exceptions based upon those issues.

The Appellant Has Further Been Denied Due Process in That He Has Been Compelled to Submit to the Caprice of a Hostile, Partial, Biased and Prejudiced Judge.

The appellant has never been given an opportunity to prove, by testimony, his charge that the said judge of the Superior Court is hostile, partial, biased, and prejudiced.

This Court has already been supplied with illustrations of this judge's hostility and partiality in *Rines v. Justices of the Superior Court, supra.* From that case, this Court

knows, for example, that: first, the said judge of the Superior Court directed verdicts for the defendants in two of the said sixteen actions at law, after the jury had found for the plaintiff; and then, fearing that this might turn out to be the rare instance where the appellant might perhaps prevail before the Full Court, upon a Petition to Establish the Truth of Exceptions, and in order to prevent the appellant, therefore, from obtaining such review before the Full Court, the said judge of the Superior Court, *three and one-half years after the trial,* and long after the first three bills of exceptions had already been filed, ordered new trials in those same two actions at law in which he had previously directed verdicts for the defendants. Those orders for new trial were issued, furthermore, after a secret hearing, in a locked private room of the Court House from which the said judge of the Superior Court excluded the appellant, without affording the appellant an opportunity either to offer evidence or to be heard.

As appears from paragraph 12 of the amended or substitute petition for a writ of mandamus, *Rines v. Justices of the Superior Court, supra,* and pages 2 and 3 of the appellant's affidavits accompanying the petitions for rehearing, furthermore, the said judge of the Superior Court, in open court, shook a finger at the appellant's attorney, Lester W. Cooch, Esquire, reprimanded the appellant and uttered threats as to what he would do unless his orders with respect to amendments were exactly complied with; and he later ordered the appellant's attorney, Mr. Cooch, out of his chambers; wherefore Mr. Cooch requested of the appellant to be excused from representing the appellant further before, and from further humiliation by, the said judge of the Superior Court, explaining that, in any event, he could not be of any further effective service before the said judge of the Superior Court, and that he could not assume any further responsibility for the prosecution of the said sixteen actions at law; and Mr. Cooch was pre-

vailed upon to withdraw that request only when the appellant agreed to assume all further responsibility himself. Though the said judge of the Superior Court learned later not to shake any more fingers or to utter reprimands or threats, in open court, he thereafter nevertheless continued to show his hostility, his partiality, his bias and his prejudice by his ruling against the appellant upon every possible occasion.

Unlike the practice in the Federal courts, *Cooke v. United States,* 267 U. S. 517, 539, the Chief Judge of the Superior Court contends that he has no authority to replace the said hostile, partial, biased and prejudiced judge of the Superior Court by another judge (see page 7 of the appellant's affidavits accompanying the petitions for rehearing). And, as appears from the above, the appellant can obtain no relief in the Supreme Judicial Court, either, whether before the Full Court, or before a single Justice thereof.

A litigant who is compelled to submit to the caprice of a biased and prejudiced judge is denied due process. *Tumey v. Ohio,* 273 U. S. 510, 522-523, 535. Attention is invited also to the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 73. It is believed that, in the state courts, as in the federal courts, *Berger v. United States,* 255 U. S. 22, 35-36, not only should the tribunals of the country be impartial in the controversies submitted to them, but also they should give assurance that they are impartial and free from any bias or prejudice that might disturb the normal course of impartial judgment. It is believed that a partial, biased, prejudiced or hostile judge even automatically loses jurisdiction to proceed further as soon as he displays his partiality, bias, prejudice or hostility, *Johnson v. Zerbst,* 304 U. S. 458, 468, *Niznick v. United States,* 1949, 6 Cir., 173 F. 2d 328, 336; the right to impartial jus-

tice is fundamental, *Whitaker v. McLean,* C. A. D. C., 1941, 118 F. 2d 596.

Even an unbiased judge is required to permit a litigant to present evidence, and to be heard, *Brinkerhoff-Faris Trust and Savings Company v. Hill,* 281 U. S. 673, 678, 682, *Shelley v. Kraemer,* 334 U. S. 1, 16.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

It is obvious from the above that, under the said statutes and rules of Court, as applied, it is impossible for a petitioner, after he has met with injustice at the hands of the judge of the Superior Court, to obtain justice before the Full Court. There is consequently a graveyard full of buried Petitions to Establish the Truth of Exceptions.

On page 126 of his recent volume, entitled, "It's Your Law", Harvard University Press, 1954, Charles P. Curtis, Esquire, of Boston, Massachusetts, says:

> Remember the Sacco-Vanzetti case. The trial judge, Judge Thayer, had shamed himself, but off the bench, not in court. On the bench, in court, he had followed the rules * * *. But the Supreme Judicial Court of Massachusetts made no attempt to find out whether justice had been done. It did no more than the statutes then required it to do, which was simply to see if the rules had been followed; and they had been followed, no more and no less. The Court did not even sniff, far less taste, the dish.

Judges of the Superior Court of the Commonwealth of Massachusetts have not stopped "shaming" themselves. This particular judge of the Superior Court has "shamed himself", first, even *on* the bench, and later, off the bench; and the Supreme Judicial Court of Massachusetts still makes "no attempt to find out whether justice had been done", and it still does "no more than the statutes then required it to do, which was simply to see if the rules had been followed".

With the "rules" as they are "followed" therefore, to paraphrase *Sacher v. United States,* 343 U. S. 1, 12,

> The profession knows that litigants in the Superior Court of Massachusetts are actually at the mercy of a single trial judge.

A decision on these appeals will be of far more reaching effect, therefore, than upon the appellant alone. It will affect every litigant in the Superior Court of the Commonwealth of Massachusetts.

The questions involved in these cases are accordingly just as important as those that were decided in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U. S. 579. Our liberties will be no more safe if the judiciary should be allowed to impair them than if the President of the United States should be allowed to seize the steel plants.

Though, as stated in *Pomerantz v. Clark,* D. C., Mass., 1951, 101 F. Supp. 341, 346, "The eminence of the Massachusetts Supreme Judicial Court [is] * * * not surpassed by any American tribunal", nevertheless, *Robbins v. Green,* 1 Cir., 1954, 218 F. 2d 192, 195, "There comes a point where federal judges in discharge of their present statutory duty are obliged" to hold even that eminent tribunal within constitutional bounds. *O'Brien v. Lindsey,* 1 Cir., 1953, 204 F. 2d 359, final disposition, 210 F. 2d 953.

These cases are important for the further reason that, as also appears from the record in *Rines v. Justices of the Superior Court, supra,* having spent several years, at several medical schools, for the very purpose of learning what had happened to his wife (for he could obtain no true facts from doctor, nurse or hospital), the appellant became enabled to present a record, in the Superior Court, such as, it is believed, has never before been presented to a court, and that probably will not again be presented to a court for many a year in the future, if ever. That record, if the

appellant should prevail upon these appeals, will present to the Supreme Judicial Court, for adjudication, the legality of the present-day practices of the medical profession.

It is very important that those practices of the medical profession that led to the premature death of the plaintiff's wife should be passed upon by judicial process, in order to put an end to them if, as the appellant contends, they are detrimental to the interests of the patient, and serve only to protect physicians and hospitals against the consequences of their malpractices.

It is well known that it is generally impossible for a plaintiff in a malpractice suit to obtain medical testimony, in order to sustain his burden of proof. Attention is invited, for example, to *"Minimum Standards of Judicial Administration"*, edited by Arthur T. Vanderbilt, New Jersey's Chief Justice, and published by the Law Center of New York University for the National Conference of Judicial Councils, 1949. On page 323, Chapter VIII, there are found ten Recommendations for Reference, Further Study, Etc. The seventh of these further recommendations reads as follows:

> (7) That the American Medical Association be requested to examine its canon of ethics regarding the giving of testimony by one physician against another, in malpractice suits, with a view of removing the obstacle which the canon is frequently interpreted as interposing in this type of litigation.

In elaboration upon this seventh recommendation, the following appears, on page 380:

> In malpractice suits against a medical practitioner the plaintiff is almost entirely dependent on the testimony of other practitioners, since in most states the plaintiff must adduce the testimony of a qualified medical expert with respect to the technical aspects of the alleged malpractice. The difficulties met in obtaining expert or medical testimony in prosecuting a malpractice action were vividly illustrated in the case of

> Rines [misspelled Reeves] v. Klein *et al.* in the Superior Court of Massachusetts, decided in the plaintiff's favor on February 19, 1948."*

A footnote makes reference to an account in 6 Harv. L. School Review, No. 2, p. 1 (Feb. 25, 1948).

Included in the issues that would be decided by the Supreme Judicial Court, if the appellant should prevail on these appeals, is the right of a judge of the Superior Court to disqualify such medical witnesses as a plaintiff in a malpractice suit may happen miraculously to unearth. That right has been passed upon in New Jersey, *Carbone v. Warburton*, 1953, 94 A. 2d 680, 684-685. See also *Steiginga v. Thron*, 1954, 105 A. 2d 10. The appellant's actions at law, if they could be reviewed by the Supreme Judicial Court, would lead to a ruling upon the same point in the Courts of the Commonwealth of Massachusetts. It is very important to obtain such a ruling.

By entertaining these appeals, therefore, this Court will perform a public service of great value.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of these appeals, and that substantial federal questions are presented.

Respectfully submitted,

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* The decision in the appellant's favor, as this Court now knows, was set aside by the said judge of the Superior Court.

APPENDIX A

THE OPINION OF THE SUPREME JUDICIAL COURT, DATED NOVEMBER 5, 1954

DAVID RINES, petitioner.
DAVID RINES, petitioner.

Norfolk. October 4, 8, 1954.—November 5, 1954.
Present: QUA, C.J., LUMMUS, WILLIAMS, & COUNIHAN, JJ.
Practice, Civil, Exceptions: allowance and establishment, contents of bill.

QUA, C.J. These are two petitions filed under G. L. (Ter. Ed.) c. 231, § 117, by the petitioner both individually and as administrator of the estate of his deceased wife Lucy L. Rines to establish respectively two consolidated bills of exceptions in sixteen actions at law tried in the Superior Court in some of which the petitioner brought the action personally and in others of which he brought the action in his capacity as administrator.

THE FIRST PETITION.

The first petition, filed on May 4, 1954 seeks to establish the petitioner's so called "Second Substitute Consolidated Bill of Exceptions," filed on May 4, 1951. This bill, as its title indicates, is not an original bill of exceptions. It is a matter of serious doubt whether the trial Court ever permitted it to be filed or to stand as a substitute for or amendment of the original bill. What happened was that the petitioner moved to amend his original bill by substituting therefor his "Substitute Consolidated Bill of Exceptions" (not the one to which this first petition relates). On January 8, 1951, this motion was denied, but by the same order the petitioner was granted leave to amend his original bill

by filing a "Second Substitute Consolidated Bill of Exceptions" on or before May 6, 1951. Such a bill (the one to which this first petition does relate) was filed on May 4, 1951, and was seasonably presented to the trial judge, and affidavits of presentation were seasonably filed. Thereafter a hearing was held on June 29, 1953, and on July 2 the trial judge entered an order reading, "After hearing upon the allowance of the plaintiff's Second Substitute Consolidated Bill of Exceptions, it is ordered that the plaintiff be given leave to file on or before September 15, 1953, an Amended Second Substitute Consolidated Bill of Exceptions which will:—

"1. Set forth in full the charge of the Court to the Jury; and * * *." Then follows a detailed enumeration of changes which were to be made in the "Second Substitute Consolidated Bill of Exceptions" (the one to which this first petition relates). In pursuance of this order the petitioner did, on September 15, 1953, file an "Amended Second Substitute Consolidated Bill of Exceptions" (not the one to which this first petition relates) in which he incorporated some of the changes specified in the order of July 2, 1953, but failed to incorporate others which he contends were not conformable to the truth. The petition alleges that this amended bill "was never substituted for the said Second Substitute Consolidated Bill of Exceptions" (the one to which this first petition relates). It does not appear that any order was ever made expressly permitting this "Second Substitute Consolidated Bill of Exceptions" (the one to which this petition relates) to be filed or to stand as an amendment to the original bill. If such amendment was never permitted in the trial court this "Second Substitute Consolidated Bill of Exceptions" (the one to which this first petition relates) has no standing and cannot be established in this Court. *Graustein, petitioner,* 304 Mass. 679. *Hector v. Boston*

Electric Light Co., 161 Mass. 558, 560-561. *Ryder v. Jenkins*, 163 Mass. 536, 538. See *Barnard Manuf. Co. v. Eugen C. Andres Co.*, 234 Mass. 148.

The petitioner contends, however, as we understand him, that the order of the Court of July 2, 1953, containing at its beginning the words, "After hearing upon the allowance of the plaintiff's Second Substitute Consolidated Bill of Exceptions [the one to which this first petition relates], it is ordered that the plaintiff be given leave to file on or before September 15, 1953, an Amended Second Substitute Consolidated Bill of Exceptions * * *" constituted an implied recognition of the "Second Substitute Consolidated Bill of Exceptions" (the one to which this first petition relates) as having been properly filed so that a hearing could be, and was, had upon the question of its allowance, and that this was equivalent to a formal order permitting the petitioner to amend the then pending exceptions in accordance with said "Second Substitute Consolidated Bill of Exceptions."

If we accept this contention the petitioner's position is not improved. If, as this contention presupposes, the judge held a hearing on June 29, 1953, on the question of allowance of the petitioner's "Second Substitute Consolidated Bill of Exceptions" (the one to which this first petition relates) it is plain that his order of July 2 represented the action which he intended to take as a result of that hearing, and that this action was not an allowance of that bill of exceptions. It was a disallowance of the bill as filed, even though accompanied by a statement in precise detail of what changes might be made in it on or before September 15 which presumably would induce the judge to allow it as changed. Some of these changes were never made. It is provided by G. L. (Ter. Ed.) c. 231, § 117, that if the judge "disallows or fails to sign and return the exceptions or al-

ters any statement therein" the truth of the exceptions presented may be established before this Court. By his order of July 2, 1953, the judge made it abundantly clear that he had no intention of signing and returning the bill of exceptions in the form presented to him, and that he refused to allow it.

Rule 22 of the Rules for the Regulation of Practice before the Full Court, 328 Mass. 692, 701-702, provides that whenever a party seeks to establish the truth of allegations in a bill of exceptions which a judge has refused to allow and sign he shall file his petition within twenty days after notice of such refusal, and that no party shall be allowed to establish the truth of any such allegations in this Court if he has failed to comply with this rule. The first petition to establish now before us was not filed until May 4, 1954, more than ten months after the order of the judge refusing to allow and sign the "Second Substitute Consolidated Bill of Exceptions." It must be assumed, in the absence of anything to show the contrary, that the petitioner had notice in due course of the action of the judge. This first petition was therefore filed too late.

If the petitioner's "Second Substitute Consolidated Bill of Exceptions" (the one to which this first petition relates) was not disallowed by the order of the Court of July 2, 1953, there is nothing anywhere in the petition or the accompanying affidavits to show that it has been disallowed at all, unless indeed an order in December, 1953, dismissing all bills of exceptions filed by the petitioner could somehow be construed as a disallowance of them, and even in that event the first petition to establish now before us was not filed within the time required by Rule 22.

This first petition therefore must be dismissed.

THE SECOND PETITION.

The second petition filed on May 20, 1954, seeks to establish the petitioner's very first consolidated bill of exceptions without regard to any subsequent amendments or attempts to amend. The petition rests upon the theory that, although this bill was filed several years ago, "no hearing has ever been held on said consolidated bill of exceptions and no action has ever been taken thereon by the trial judge." The petitioner, however, states that on January 8, 1951, the judge denied the petitioner's motion to amend his original bill by substituting therefor his "Substitute Consolidated Bill of Exceptions," but by the same order granted leave to amend the original bill by filing a "Second Substitute Consolidated Bill of Exceptions." This second substitute bill was the subject of the order of July 2, 1953, previously referred to, wherein the judge stated that "After hearing upon the allowance of the plaintiff's Second Substitute Consolidated Bill of Exceptions" the plaintiff was given leave to file an "Amended Second Substitute Consolidated Bill of Exceptions" which should contain the specific enumerated changes to which reference has already been made. If either of the orders just referred to constituted a disallowance of the original bill, or a failure to sign and return it, or an alteration of it, all within the meaning of § 117, this second petition to establish was filed far too late to comply with Rule 22. Moreover, if the order of July 2, 1953, had the effect, as the petitioner has contended, of recognizing the "Second Substitute Consolidated Bill of Exceptions" as an amended bill, even though disallowed by the order, then this "Second Substitute Consolidated Bill of Exceptions" took the place of the original consolidated bill and the original bill cannot now be established for that reason.

But there is another reason which in our opinion is fatal to the establishment of the original consolidated bill. General Laws (Ter. Ed.) c. 231, § 113, as appearing in St. 1945, c. 328, provides that exceptions "shall be reduced to writing in a summary manner." This requirement seems to have been almost entirely disregarded in preparing the original consolidated bill of exceptions now sought to be established. This bill contains in three thick volumes 1,101 long typewritten pages, without counting copies of the pleadings annexed at the end. Of these pages approximately 1,000 consist of testimony of which much the greater part is reproduced verbatim by question and answer simply copied from the transcript. No serious attempt appears to have been made to summarize this evidence. The intent seems to have been to reproduce it practically in its entirety to the smallest detail. It is true that a number of cases were tried together on about seventeen trial days but all of the cases related to the medical history and treatment of one person over a comparatively short period of time. It may also be said that these were cases in which cross-examination might be of peculiar significance. But nevertheless there is nothing in the cases to justify the inclusion in a bill of exceptions of any such mass of material. That this was unnecessary is demonstrated by the fact that the "Second Substitute Consolidated Bill of Exceptions," to which the first of these present petitions relates, has been successfully reduced to slightly less than one quarter of the size of the original consolidated bill without loss of effectiveness. We think it could have been still further reduced. A proper bill of exceptions should have been settled in the Superior Court. A petition to establish exceptions in this Court cannot be used as a means of completely redrafting or remodeling the bill in this Court. *Graustein, petitioner,* 305

Mass. 568, 570. Because the original consolidated bill of exceptions does not comply with the statute, this second petition, which is a petition to establish that bill, must be dismissed. *Churchill v. Palmer,* 115 Mass. 310, 314-315. *Ryder v. Jenkins,* 163 Mass. 536. *Taylor v. Pierce Brothers, Ltd.,* 219 Mass. 187. *Freedman, petitioner,* 222 Mass. 179, 181. *Graustein, petitioner,* 305 Mass. 568. See *Horan, petitioner,* 207 Mass. 256; *Cornell-Andrews Smelting Co. v. Boston & Providence Railroad,* 215 Mass. 381, 387; *Isenbeck v. Burroughs,* 217 Mass. 537, 539; *Romana v. Boston Elevated Railway,* 218 Mass. 76, 81; *Corsick v. Boston Elevated Railway,* 218 Mass. 144, 145.

Petitions dismissed.

Lester W. Cooch, (*David Rines* with him,) for the petitioner.

Bertram A. Sugarman, for the respondents Mary Gilmore and others.

John A. Perkins & John F. Dunn, for the respondent Louis Wolff.

Leon F. Sargent, for the respondent Isaac R. Jankelson.

THE RESCRIPT OR JUDGMENT DISMISSING EACH OF THE CASES NO. 11,437 AND NO. 11,446

Petition Dismissed.

Ordered that a copy of this rescript be transmitted to the Clerk of the Courts for the County of Norfolk where the original case of David Rines, administrator, v. Armin Klein and fifteen companion cases are pending.

By the Court,

FREDERICK L. QUINLAN,
Clerk.

APPENDIX B

STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, GENERAL LAWS, TERCENTENARY EDITION

Chapter 231, section 113, as amended by St. 1945, c. 328, Vol. II, page 2876

"Exceptions may be alleged by any party aggrieved by an opinion, ruling, direction or judgment of the supreme judicial court, of the superior court, or of the land court, rendered upon any matter of law in any civil cause, according to the course of the common law or otherwise, tried by a jury or heard by the court, or upon a motion for a new trial. The exceptions shall be reduced to writing in a summary manner and filed with the clerk, and notice thereof shall be given to the adverse party, in civil cases tried by a jury, within twenty days after the verdict is rendered, and in cases tried without a jury, within twenty days after the notice of the decision has been received, unless further time is allowed by the court. The presiding justice shall thereafter, upon their presentation to him by any party to the action, examine the exceptions, and after hearing the parties, determine whether they are conformable to the truth. The excepting party may be allowed to make such amendments to his bill of exceptions as will make it a more accurate statement of the exceptions originally filed by him. If the presiding justice finds that the exceptions, with any amendments thereof thus allowed, are conformable to the truth, he shall allow them. The presiding justice may, if, in his opinion, a bill of exceptions is filed in good faith, and justice so requires, allow such bill of exceptions, although the excepting party or his attorney failed, through inadvertence, to comply with all of the provisions of this section. If, through inadvertence, a party who has duly claimed exceptions failed to file a bill of exceptions within said twenty days or within such further time as may have been allowed, the presiding justice may, before final judg-

ment, upon motion after notice and hearing, allow a bill of exceptions to be filed and may allow such bill of exceptions."

Chapter 231, section 117, Vol. II, page 2878

"If the presiding justice, or another justice acting under section one hundred and fifteen, disallows or fails to sign and return the exceptions or alters any statement therein, and either party is aggrieved thereby, the truth of the exceptions presented may be established before the full court upon petition stating the grievance, and thereupon, the truth of the exceptions being established, they shall be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered. The supreme judicial court shall make rules for settling the truth of exceptions alleged and not allowed."

RULES OF COURT

Rule 22 of the Rules for the Regulation of Practice Before the Full Court

ESTABLISHMENT OF TRUTH OF EXCEPTIONS.

Whenever a party seeks to establish before this court the truth of any allegations in a bill of exceptions, which a judge has refused to allow and sign, he shall, within twenty days after notice of such refusal, file his petition and four copies thereof, the petition to be verified by affidavit, setting forth in full said allegations, and all facts material thereto, in the court of the county in which the exceptions would by law have been entered, if duly signed and allowed; and shall, not later than the day of the filing of his petition, give notice thereof to the adverse party, by delivering a copy thereof to him or his attorney of record. No party shall be allowed to establish the truth of any such allegations in this court if he has failed to comply with this rule.

Rule 74 of the Rules of the Superior Court of Massachusetts

ALLOWANCE OF BILLS OF EXCEPTIONS.

If within three months after filing, a bill of exceptions has not been allowed or disallowed by the justice to whose opinion, ruling, direction or judgment the exceptions were taken, the clerk shall forthwith notify the parties interested and such justice that unless within thirty days thereafter, or within such further time as may be allowed, an affidavit is filed with the clerk that the bill of exceptions has been presented by a party to the proper justice for allowance, the bill of exceptions will be dismissed and judgment or decree will be entered as though no exceptions had been filed.

If, within such time, the bill of exceptions is neither allowed nor disallowed, and no such affidavit is filed, the exceptions shall be dismissed by the clerk without further notice or order.

The justice to whose opinion, ruling, direction or judgment the exceptions were alleged may grant further time, and no other justice may do so, except in the cases provided for by G. L. (Ter. Ed.) c. 231 sec 115 or where such justice is unavailable by reason of illness or absence from the Commonwealth or where any one extension does not exceed ten days. The clerk shall notify such justice when such extension is granted by another justice. In all cases application for an extension of time shall be made by a motion which shall state the name of such justice, the date of the filing of the bill of exceptions, and the number of extensions that have been granted, if any, with the date of expiration of the last extension.

The clerk shall notify the parties of the allowance or disallowance of a bill of exceptions.

APPENDIX C

THE QUESTIONS PRESENTED

1. Where, in a civil cause tried by a jury, as provided for by the first statute of the Commonwealth, the said section 113, exceptions to the rulings of a judge of the Superior Court, reduced to writing in a summary manner, have been presented to the said judge, who, however, though often requested, has refused to hear the parties with respect to the said exceptions; and where, under the provisions of the second statute of the Commonwealth, the said section 117, a petition to establish the truth of the exceptions has thereupon been filed in the Supreme Judicial Court; but where the Supreme Judicial Court, without affording opportunity to present evidence, and after only a part argument, which argument the Supreme Judicial Court suspended, and without even resuming the suspended argument, has dismissed the said petition, setting forth, as ground for the dismissal, the conclusion, based upon the incomplete record thus made up, that the said exceptions have not been reduced to writing in a summary manner; whereby the excepting party has become driven out of court without being afforded a hearing, either in the Superior Court or the Supreme Judicial Court, either upon his exceptions, or as to whether the exceptions have or have not been reduced to writing in a summary manner; are the said two statutes of the Commonwealth, the said sections 113 and 117, as applied, valid, or, on the contrary, are they repugnant to the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of his property without due process of law?

2. Where this is the only instance, in the whole history of the Commonwealth, of an excepting party being refused a hearing in the Superior Court upon his exceptions, are

the said two statutes, the said sections 113 and 117, as applied, valid, or, on the contrary, are they repugnant to the Fourteenth Amendment to the Constitution of the United States, as denying the excepting party, a person within the jurisdiction of the Commonwealth, the equal protection of the laws?

3. Does this refusal of the Superior Court and the Supreme Judicial Court to permit the excepting party to complete the litigation, through the medium of his exceptions, that he commenced in the Superior Court, constitute a denial of further access to the courts of the Commonwealth, in abridgment of his privileges and immunities, as a citizen of the United States, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?

4. Are the answers to Questions 1, 2 and 3 altered by the fact that the reasons assigned by the Supreme Judicial Court in support of the ground for its said conclusion that the exceptions have not been reduced to writing in a summary manner were based either upon pure speculation, or else upon secret information known only to the Supreme Judicial Court, and not of record?

5. Are the answers to Questions 1, 2, 3 and 4 altered by the fact that, though the said first statute, the said section 113, provides that the excepting party may be allowed to make such amendments to his bill of exceptions as will make it a more accurate statement of the exceptions originally filed by him, the said judge of the Superior Court has nevertheless denied a motion to amend the original bill of exceptions by substituting therefor a first "Substitute Consolidated Bill of Exceptions" that constitutes a more accurate statement of the exceptions contained in the original bill of exceptions, and, under the

said two statutes, the said sections 113 and 117, as applied, no provision is made for reviewing the action of the said judge in denying the said motion to amend?

6. Where the said judge of the Superior Court has issued an order granting leave to amend the original bill of exceptions by filing, as a substitute therefor, a "Second Substitute Consolidated Bill of Exceptions"; where, though the "Second Substitute Consolidated Bill of Exceptions", filed pursuant thereto, conforms fully to such order, the said judge of the Superior Court has nevertheless refused to hear the excepting party or to receive evidence with respect to whether the "Second Substitute Consolidated Bill of Exceptions" does or does not conform fully to such order; where, despite such full conformity, the said judge of the Superior Court has nevertheless refused to allow the "Second Substitute Consolidated Bill of Exceptions", and has refused also to disallow the same, and has refused further either to grant or to deny either of two motions, one to substitute the "Second Substitute Consolidated Bill of Exceptions" for the original bill of exceptions, and the other to allow the "Second Substitute Consolidated Bill of Exceptions"; and where the Supreme Judicial Court, applying the second statute, the said section 117, and Rule 22 of its own rules of Court, has held that such refusal of the judge of the Superior Court constituted a disallowance of the "Second Substitute Consolidated Bill of Exceptions", contrary to its prior holdings that a judge of the Superior Court may not allow or disallow exceptions except by means of a certificate in writing signed by him; are the said statutes of the Commonwealth and the said rule of Court, as so applied, valid, or, on the contrary, are they repugnant to the Fourteenth Amendment to the Constitution of the United States, as depriving the excepting party of his property without due process of law

and denying him the equal protection of the laws, besides abridging his privileges and immunities, as a citizen of the United States?

7. Are the said statutes of the Commonwealth and the said rule of Court, as applied by the Supreme Judicial Court, valid, or, on the contrary, are they repugnant to the Fourteenth Amendment to the Constitution of the United States, as depriving the excepting party of his property without due process of law and denying him the equal protection of the laws, besides abridging his privileges and immunities, as a citizen of the United States, since they authorize the judge of the Superior Court, without a hearing, to refuse to allow or disallow the original bill of exceptions, or to permit the original bill of exceptions to be amended, or to permit an amended bill of exceptions to stand as a substitute for or an amendment to the original bill of exceptions, at the same time providing for no review whatever of such refusal of the judge of the Superior Court, whether by the Supreme Judicial Court or any other tribunal?

8. The original bill of exceptions, the first "Substitute Consolidated Bill of Exceptions" and the "Second Substitute Consolidated Bill of Exceptions" contained exceptions arising out of a consolidated trial, by a jury, of sixteen actions at law in the Superior Court, most of the issues of which were disposed of by directed verdicts, but in two of the actions of which the jury found in favor of the appellant. Where, long after all three of these bills of exceptions had been filed, and more than three and one-half years after the consolidated trial, the said judge of the Superior Court ordered new trials in the said two actions at law in which the jury, as before stated, found in favor of the appellant, thereby automatically depriving the Supreme Judicial Court, since the said two actions

at law were no longer finally disposed of, of jurisdiction to hear a very substantial part of the issues raised by the said three bills of exceptions; where the said judge of the Superior Court thereafter, on July 2, 1953, issued an order granting leave to file an "Amended Second Substitute Consolidated Bill of Exceptions" that shall contain particular changes, though ignoring the excepting party's protests that some of the ordered changes did not conform to the truth, which "Amended Second Substitute Consolidated Bill of Exceptions", when filed, accordingly became a new original bill of exceptions confined to the issues raised in the remaining fourteen actions at law; where, after the filing of this new original bill of exceptions, entitled, "Amended Second Substitute Consolidated Bill of Exceptions", the said judge of the Superior Court, though refusing to receive evidence, denied a motion to allow the same; where the excepting party, under the provisions of the second statute, the said section 117, and the said Rule [illegible] the rules of Court, thereupon filed, in the Supreme [illegible]al Court, a petition to establish the truth of the exceptions contained in this new original bill of exceptions, "Amended Second Substitute Consolidated Bill of Exceptions"; and where the Supreme Judicial Court, without affording opportunity to present evidence, but applying the said statutes and the said rule of Court, dismissed the said petition, setting forth, as ground for such dismissal, that, irrespective of whether the new original bill of exceptions, entitled "Amended Second Substitute Consolidated Bill of Exceptions", does or does not conform to the truth, it nevertheless does not contain all the particular changes ordered by the said judge of the Superior Court, by the said order of July 2, 1953, to be included therein; are the said statutes of the Commonwealth and the rule of Court, as so applied, valid, or on the contrary, are they repugnant to the Fourteenth Amend-

OPY

ment of the Constitution of the United States, as depriving the excepting party of his property without due process of law and denying him the equal protection of the laws, besides abridging his privileges and immunities, as a citizen of the United States?

9. Is the answer to Question 8 altered by the fact that the said particular changes, ordered by the said order of July 2, 1953, that were not included in the new original bill of exceptions, entitled, "Amended Second Substitute Consolidated Bill of Exceptions", did not conform to the truth, wherefore the said order of July 2, 1953 was, to that extent, illegal, and the excepting party has accordingly been punished, without a hearing, by being driven out of court altogether, for refusing to comply with the illegal order of July 2, 1953, insofar as it was illegal?

10. Is the answer to Question 9 altered by the fact that, prior to the said order granting leave to file the new original bill of exceptions, entitled, "Amended Second Substitute Consolidated Bill of Exceptions", the excepting party asked the said judge of the Superior Court, both orally and in writing, for the privilege of offering evidence upon the matter as to whether the said ordered changes that were not included in the new original bill of exceptions, entitled, "Amended Second Substitute Consolidated Bill of Exceptions", do or do not conform to the truth, but the said judge of the Superior Court issued the said order including the said changes without receiving the offered evidence?

11. Are the answers to any and all of Questions 1 to 10 altered by the fact that the said judge of the Superior Court is partial, biased, prejudiced and hostile, and that his before-described actions relating to the said various bills of exceptions were purely arbitrary and capricious?

12. Are the answers to any and all of Questions 1 to 10 altered by the further fact that the excepting party had requested both the Chief Judge of the Superior Court and the Supreme Judicial Court to disqualify the said judge of the Superior Court from taking any further action in the said sixteen actions at law, but these requests had both been denied, whereby the excepting party was compelled to continue to subject himself to the arbitrary and capricious actions of this partial, biased, prejudicial and hostile judge, until he was driven out of court altogether?

13. Are the answers to Questions 1 to 12 altered by the fact that, though the excepting party had entered, in the Supreme Judicial Court, a petition for a writ of mandamus, praying that the said judge of the Superior Court be required and directed either to allow or disallow formally the "Second Substitute Consolidated Bill of Exceptions", and also to make a ruling as to whether the new original bill of exceptions, entitled, "Amended Second Substitute Consolidated Bill of Exceptions", does or does not comply with the said order of July 2, 1953, granting leave to file the same, insofar as the said particular changes ordered to be included therein conform to the truth, and again praying that the said judge of the Superior Court be required and directed to disqualify himself from any other and further participation in any manner in any of the said sixteen actions at law, the petition for a writ of mandamus was denied, through a refusal to issue an order of notice, by a single justice of the Supreme Judicial Court?

14. Are the said statutes of the Commonwealth and the said rule of Court, as applied by the Supreme Judicial Court, valid or, on the contrary, are they repugnant to the Fourteenth Amendment to the Constitution of the United States, as depriving the excepting party of his property,

without due process of law and denying him the equal protection of the laws, besides abridging his privileges and immunities, as a citizen of the United States, since they: first, authorize an original bill of exceptions to be dismissed, without hearing of any kind in the Superior Court, and pursuant to only an incomplete record based upon a hearing in the Supreme Judicial Court at which no evidence may be presented, but only a suspended part argument, and for reasons based either upon pure speculation, or else upon secret information known only to the Supreme Judicial Court, and not of record; secondly, authorize a judge of the Superior Court, even if not, and particularly if he is, partial, biased, prejudiced and hostile, arbitrarily and capriciously to refuse to grant a hearing upon the original bill of exceptions, or to either allow or disallow the original bill of exceptions, and to refuse to permit the original bill of exceptions to be amended, and to refuse to permit an amended bill of exceptions to stand as a substitute for or an amendment to the original bill of exceptions; thirdly, authorize a judge of the Superior Court to order, as a condition to his permitting an original bill of exceptions to be amended, that the amended bill of exceptions shall not conform to the truth; and, fourth, provide no check upon the arbitrariness and caprice of the judge of the Superior Court, since, as the Supreme Judicial Court has held, a proper bill of exceptions must be settled in the Superior Court, and the Supreme Judicial Court has no authority or power, under the said statutes and the said rule, as applied, to compel the judge of the Superior Court to settle a proper bill of exceptions?

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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 694.

DAVID RINES, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, PETITIONER TO ESTABLISH THE TRUTH OF EXCEPTIONS,
Appellant.

APPELLEES' MOTION TO DISMISS APPEALS.

To the Honorable the Justices of the Supreme Court of the United States:

Now come the appellees in the above-entitled cause and move that the appeals entered by the appellant therein be dismissed upon the following facts and grounds:

The appellant, who now appears on his own behalf herein, brought sixteen actions at law in the Superior Court for Norfolk County, Massachusetts, the defendants being a hospital, five doctors and three nurses, who, it was alleged, had by neglect brought about the death of the appellant's wife. The appellant sued both individually and as the administrator of his wife's estate.

The cases were tried over many days in 1948. On some counts verdicts were directed for the defendant; on some counts verdicts for the defendant were entered under leave reserved after the jury had found for the plaintiff; in some cases the jury found for the defendants; and upon some counts, where the jury had found for the plaintiff, new trials were thereafter ordered in the Superior Court (see

Rines v. *Justices of the Superior Court,* 330 Mass. 368). The appellant's statement at page 7 of the jurisdictional statement is inaccurate.

The cases whereof new trials were ordered have never been brought to trial.

From 1948 to the present time the appellant has endeavored, by a multiplicity of proceedings, to obtain review, upon bill of exceptions, of the decision in the trial court. The resulting sequence of events is adequately described in the decision of the Supreme Judicial Court of Massachusetts upon its most recent phase—*Rines* v. *Clerk of Courts for the County of Norfolk,* 1955 Mass. Advance Sheets 453, handed down April 18, 1955, a full copy of which is appended (as Exhibit A) to the appellees' brief herein. The appellant's endeavor has been characterized by manifest unwillingness to comply with statutes, rules of court and orders of the trial judge in that connection, as the Supreme Judicial Court's opinion in the present case makes clear. *Rines, petitioner,* cited next below.

The appeals, dismissal of which is sought by this motion, are from the decision of the State Court upon the appellant's petitions to establish his so-called "Second Substitute Consolidated Bill of Exceptions" and his (first) "Consolidated Bill of Exceptions," without regard to any subsequent amendments or attempts to amend. The opinion thereon, reported as *Rines, petitioner,* 331 Mass. 714, 1954 Mass. Advance Sheets, page 819, is set forth in full at pages 31-37 of the appellant's Jurisdictional Statement. From first to last it deals solely with the procedural requirements of Massachusetts law with respect to bills of exceptions.

No federal constitutional question was raised by the appellant at any stage of these proceedings until after the entry of the above decision. Thereupon the appellant presented to the Chief Justice of the Supreme Judicial Court

a formal petition for rehearing, although no such formal procedure is known to the Massachusetts practice. It is said that in this "petition," which the appellees have never seen, the appellant propounded alleged federal constitutional questions. All the Justices of the State Court who had taken part in the original decision examined the petition and thereupon an order was rendered upon the "petition" as follows: "February 1, 1955. Denied."—all as appears on page 5 of the Jurisdictional Statement.

Upon the foregoing facts, and all facts presented to this Court by the papers which have been transmitted to it by the Supreme Judicial Court of Massachusetts, the appellees herein rest this their motion to dismiss upon the following grounds:

1. That the appeals present no substantial federal question.

2. That no federal question sought to be reviewed was timely or properly raised.

3. That no federal question sought to be reviewed was expressly passed on by the State Court.

4. That the judgment of the State Court rests upon an adequate non-federal basis.

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BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS APPEAL.

The appellees in the above-entitled cause respectfully submit this brief in support of their motion to dismiss herein.

Opening Statement.

The statement of facts in the appellees' motion to dismiss is, for brevity, not restated herein but is incorporated by reference. Any further material facts will be alluded to hereinafter where particularly pertinent to the subject discussed.

The appellees do not accept as correct the "Questions Presented" in Appendix C annexed to the appellant's Jurisdictional Statement, and submit that the record before this Court presents only the issues hereinafter discussed as germane to the motion to dismiss.

Argument.

I. No substantial federal question is presented.

The decision of the State Court set forth in *Rines, petitioner,* 1954 Mass. Advance Sheets, page 819, is concerned solely with the State practice for obtaining appellate review. It is, however, well settled that a right to such review is not a necessary element of due process. Such review may be denied altogether, or may be permitted upon such terms and conditions as the State may see fit to impose. See, under the Fourteenth Amendment—

Reetz v. *Michigan,* 188 U.S. 505, 508 (1903).
Standard Oil Co. of Indiana v. *Missouri ex rel. Hadley,* 224 U.S. 270, 286-287 (1912).

Lott v. *Pittman, Sheriff of Ware County, Georgia,* 243 U.S. 588, 591 (1917).
Ohio ex rel. Bryant v. *Akron Metropolitan Park District,* 281 U.S. 74, 80 (1930).

The rule is similar under the Fifth Amendment.

See *Luckenbach Steamship Co.* v. *United States,* 272 U.S. 533, 536 (1926).
District of Columbia v. *Clawans,* 300 U.S. 617, 627 (1937).

As to the equal protection of the law, any suggestion upon this record that the Supreme Judicial Court applied to this appellant any rule other than those applied to all persons similarly situated would be so devoid of substance as to be frivolous.

See *Lisenba* v. *California,* 314 U.S. 219, 226 (1941).

As to the proceedings in the Superior Court, the Jurisdictional Statement is devoid of suggestion of bias or prejudice in the conduct of the trial; while the assertion at page 24 that the Superior Court Judge was "hostile, partial, biased and prejudiced" appears to be directed to the proceedings subsequent to trial and is without foundation in the record. Even if the facts stated in the Jurisdictional Statement in this regard were true, and were deemed to evidence more than the strain which the appellant's tactics imposed upon the judicial patience, there is still nothing to indicate that they were before the Supreme Judicial Court in any wise as an isue affecting the decision appealed from. If in some manner unknown to the appellees they were alluded to in the appellant's "petition" for rehearing, they could hardly affect the cause at that date.

II. No federal question sought to be reviewed was timely or properly raised.

The general rule is well settled that an attempt to raise a federal question upon a petition for rehearing, after decision rendered, comes too late, unless the Court actually thereupon entertains the question and decides it.

Rooker v. *Fidelity Trust Co.*, 261 U.S. 114 (1923).

Live Oak Water Users' Association v. *Railroad Commission of California*, 269 U.S. 354 (1926).

Herndon v. *Georgia*, 295 U.S. 441 (1935).

The appellant appears to seek to bring himself within an exception that if the decision (of the State Appellate Court) is based upon grounds which supply a new and unexpected basis for a claim by the defeated party of the denial of constitutional right, his challenge to the unexpected ruling by petition for rehearing will be timely. The cases cited by the appellant do not, upon this record, support his contention. They are briefly discussed below:

Lisenba v. *California*, 314 U.S. 219 (1941):

The issue was the substantial one whether a confession of murder had been obtained by such means as to be constitutionally inadmissible. The issue was raised in two ways: By a petition for a rehearing of the Supreme Court decision affirming the conviction, and by a petition to the State Supreme Court for habeas corpus. In each case the State Court certified that the constitutional questions presented were explicitly overruled by the Court.

Saunders v. *Shaw*, 244 U.S. 317 (1917):

In this case the issue upon which the aggrieved party had never had an opportunity to present his evidence was

raised for the first time in a decision by the State Supreme Court reversing, upon rehearing, the decision it had just previously rendered in his favor.

Herndon v. *Georgia*, 295 U.S. 441 (1935):

The purpose of the appellant's reference to this case is presumably to call attention to the language at page 444: "whether the ruling here assailed should have been anticipated." But the sort of State Court ruling to which this language refers is a ruling embodied in the State Court's original decision, prior to petition for rehearing. It would be indeed difficult to assert with conviction that the original decision of the Massachusetts Supreme Judicial Court, now appealed from, "could not have been anticipated."

III. No federal question sought to be reviewed was expressly passed on by the State Court.

While the memorandum of the Chief Justice, quoted at page 5 of the Jurisdictional Statement, amply shows how scrupulously the Court examined the appellant's "petition," it does not contain the slightest sign that the Court passed upon the constitutional or other issues, if any, presented, or did anything other than merely to deny, in discretion, the rehearing which was available only in grace. Such a denial of rehearing presents no basis for an appeal to the United States Supreme Court.

Live Oak Water Users' Association v. *Railroad Commission of California*, 269 U.S. 354, 357 (1926).

Rooker v. *Fidelity Trust Co.*, 261 U.S. 114, 117 (1923).

The appellant cites *Lawrence* v. *State Tax Commission of Mississippi*, 286 U.S. 276 (1932), for the proposition

that the refusal of a State Court to decide a constitutional question has the same effect as a definite decision against the claim of unconstitutionality. But in that case, as the opinion clearly shows, the constitutional issue was fully argued to the State Supreme Court upon original hearing.

IV. The State Court judgment rests on an adequate non-federal basis.

It clearly appears upon the face of the Supreme Judicial Court's decision that it rested its dismissal of the so-called first petition upon its having been filed too late under Rule 22 of the Rules for the Regulation of Practice before the Full Court, 328 Mass. 692, 701-702, requiring any such petition to be filed within twenty days after notice of the refusal to allow the bill of exceptions.

The second petition, as equally appears upon the face of the decision, not only had every indication of violating Rule 22, in like manner at the first petition, but also was held to be clearly obnoxious to the provisions of General Laws (Ter. Ed.) chapter 213, section 113, as amended, requiring that exceptions "shall be reduced to writing in a summary manner."

As the provisions both of Rule 22 and of General Laws (Ter. Ed.) chapter 231, section 113, are integral parts of the appellate procedure and well within the competency of the Court and Legislature, respectively, to adopt, the adjudicated failure to comply with them necessitated the result reached, entirely irrespective of any other element in the entire history of the litigation.

Annexed hereto, marked A, as stated in the Motion to Dismiss herein, is the decision of the Supreme Judicial Court in *Rines* v. *Clerk of the Courts for the County of*

Norfolk, constituting the most recent development in, and decisive termination of many aspects of, the litigation.

It is submitted that the motion herein should be granted and the appeal dismissed.

Respectfully submitted,

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Exhibit A.

DAVID RINES, administrator, & another *vs.* CLERK OF THE COURTS FOR THE COUNTY OF NORFOLK & others.[1]

COUNIHAN, J. This is a petition by David Rines as administrator and individually (hereinafter called the petitioner) for a writ of mandamus to direct the justices of the Superior Court to vacate, set aside, and annul an order entered on January 20, 1954,[2] by one of the judges of that

[1] The Justices of the Superior Court.

[2] "In order to protect the records of the court from frivolous, unimportant, or superfluous papers it is ordered that no more papers be received, filed or docketed in the above-entitled cases unless the court shall so order."

court that no more papers be received or docketed in sixteen tort actions hereinafter referred to, and to direct the judge who entered the order to disqualify himself from further participation in any matters arising out of said actions. The petition also seeks to require and direct the clerk of the courts to receive, file, and docket certain papers which the petitioner alleges are relevant to preserve exceptions to the entry of such order in said tort actions. The respondents filed identical demurrers the first ground of which is set forth in the margin.[3] The demurrers were sustained by the single justice after hearing. The case is here upon exceptions of the petitioner to the action of the single justice. There was no error.

This petition arises out of proceedings in connection with the trial of sixteen tort actions begun by the petitioner in the Superior Court in 1945 to recover damages for the conscious suffering and death of Lucy L. Rines, his wife. The tort actions were grounded upon negligence in the care and treatment of his wife by certain doctors, nurses, and a hospital. The tort actions were tried together in 1948 before a judge and jury. The record is not entirely clear but it appears that the jury returned verdicts for the plaintiff in two of the cases, and that verdicts were entered for the defendants in the other cases by order of the judge.

During the years which followed the petitioner filed four different bills of exceptions in the Superior Court. They are titled and numbered for convenience in the order of their filing: (1) plaintiff's consolidated bill of exceptions, (2) plaintiff's substitute consolidated bill of exceptions, (3) plaintiff's second substitute consolidated bill of exceptions, and (4) plaintiff's amended second substitute con-

[3] "1. The allegations contained in the petition do not state any ground upon which the relief requested can be granted."

solidated bill of exceptions. None of the bills of exceptions has ever been before us except upon a petition to establish the truth of the exceptions therein. While the allowance of these bills of exceptions was pending, the judge on motion granted a new trial of the actions in which there were verdicts for the plaintiff and these actions are now pending in the Superior Court.

Since the trial more than seven years ago proceedings arising out of the tort actions have been before us in one form or another at least eleven times.

Cases Nos. 11207 and 11208 on the docket of this court were petitions to establish the truth of exceptions to orders of the judge allowing motions for new trials in the two tort actions in which there were verdicts for the plaintiff. These petitions were filed on July 10, 1952, and after hearing were dismissed by order of the full court on October 10, 1952, on the ground that the exceptions did not appear to be meritorious.

Failing in this the petitioner filed a petition for a writ of mandamus and a petition for a writ of certiorari to vacate, set aside, and annul the orders allowing the motions for new trials in those cases. After a hearing these petitions were dismissed. They are reported in *Rines* v. *Justices of the Superior Court,* 330 Mass. 368. Appeals were dismissed by the Supreme Court of the United States for want of a substantial Federal question. 346 U. S. 919; rehearing denied 347 U. S. 908.

Cases Nos. 11398 and 11399 on the docket of this court were petitions to establish the truth of exceptions contained in bill numbered 3 and in bill numbered 4. G. L. (Ter. Ed.) c. 231, § 117. After a hearing by the full court the petitions were dismissed by order of the full court on March 22, 1954.[1]

[1] "After hearing, the court orders that the petition be, and the same is, hereby dismissed for the reason that exceptions will not

Two other petitions seeking to establish the truth of exceptions contained in bill numbered 1 and in bill numbered 3 were heard and dismissed. They are reported in 331 Mass. 714.[1]

Bill numbered 2 has never been before us because it never has been allowed by the judge and no petition to establish the truth of those exceptions has ever been filed. The time provided for filing such a petition has long since expired. Rule 22 of the Rules for the Regulation of Practice before the Full Court (1952), 328 Mass. 701-702.

Case No. 11458 on the docket of this court was a petition to establish petitioner's exception to the denial of an order of notice by the single justice on a petition for a writ of mandamus directing the judge to allow or disallow bill numbered 3, and to rule upon bill numbered 4. It also sought to require the judge to disqualify himself from further participation in any matters arising out of the tort actions. This petition was argued at the March sitting of the full court and was dismissed by order of the full court on April 13, 1955.

Then we come to the case at bar, which is No. 11495 on the docket of this court and which was argued with case

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lie to action by the judge upon the correctness of a previous bill of exceptions. *Barnett, petitioner,* 240 Mass. 228. *Thorndike, petitioner,* 250 Mass. 408. *Weymouth, petitioner,* 251 Mass. 359, 361-362. *Commonwealth* v. *Kossowan,* 265 Mass. 436" (No. 11398).

"After hearing, the court orders that the petition be, and the same is, hereby dismissed for the reason that the bill of exceptions establishment of which is sought, to wit, plaintiff's so called amended second substitute consolidated bill of exceptions, does not appear to be either an original bill of exceptions or an original bill of exceptions as amended in accordance with any order of the judge. *Graustein, petitioner,* 304 Mass. 679. *Hector* v. *Boston Electric Light Co.* 161 Mass. 558, 560-561. *Ryder* v. *Jenkins,* 163 Mass. 536, 538. See *Thorndike, petitioner,* 257 Mass. 409; *Barnard Manufacturing Co.* v. *Eugen C. Andres Co.* 234 Mass. 148" (No. 11399).

[1] Mass. Adv. Sh. (1954) 819.

No. 11508 at the February sitting. Case No. 11508 will be dealt with in a separate opinion overruling exceptions to the denial of petitions to vacate judgments.

The petition in the case under consideration contains thirty-three allegations, most of them reciting facts which led to the issuance of the order of January 20, 1954. While the bills of exceptions were pending, the judge on December 28, 1953, allowed motions to dismiss all of the bills of exceptions. Six motions relating to some of the tort actions were filed by the petitioner and were denied by the judge on December 28, 1953. On January 4, 1954, the petitioner filed written claims of exceptions, and on January 18, 1954, he filed ten bills of exceptions in relation to these acts of the judge. After the issuance of the order that no more papers be received or filed, the petitioner attempted to file innumerable motions, bills of exceptions, and affidavits, none of which was received by the clerk of the courts.

The order of the judge about which the petitioner complains was entered in the absence of the petitioner on January 20, 1954, and the petitioner received notice of it on January 25, 1954. On the same day the petitioner seasonably sought to file with the clerk of the courts sixteen claims of exceptions to the entry of the order which the clerk of the courts refused to accept because of said order. On January 26, 1954, the petitioner presented to the judge in person several motions relating to the entry of this order. He requested the judge to allow such motions or if denied to make note of the petitioner's exceptions. The judge refused to accept and act upon such motions and refused to make note of any exceptions of the petitioner. The petitioner alleges that the refusal of the clerk of the courts to receive and enter his claims of exceptions, the refusal of the judge to receive and act upon his motions, and the refusal of the judge to make note of his exceptions

prevent the petitioner from getting on the record his exceptions to the entry of this order so that a suitable bill of exceptions could be prepared and filed, G. L. (Ter. Ed.) c. 231, § 113, as amended by St. 1945, c. 328, or if necessary, a petition be prepared and filed in this court to establish the truth of exceptions under c. 231, § 117, or under Rule 22 of the Rules for the Regulation of Practice before the Full Court (1952), 328 Mass. 701-702.

We are of opinion that in these circumstances a petition for a writ of mandamus lies, there being no other remedy open to the petitioner to preserve his exceptions if any to the entry of this order. Nothing we hold here however is inconsistent with what we said in *Rines* v. *Justices of the Superior Court*, 330 Mass. 368.

While we hold that this petition is properly before us, we nevertheless are of opinion that the demurrers were correctly sustained by the single justice. We have recited at length the nature and extent of the litigation indulged in by the petitioner in the seven years which have elapsed since the trial of these tort actions. The petition as appearing in the record recites further litigation which the petitioner has undertaken or proposes to undertake in connection with these tort actions. From what we have said hereinbefore it is plain that all matters about which the petitioner complained prior to and after the entry of this order now have been considered in one form or another and disposed of by this court. The judge was therefore right in concluding that the time had arrived to terminate the litigation except for the two cases still pending for trial in the Superior Court.

The entry of such order was within the jurisdiction of the judge. A similar order was considered in *Thorndike, petitioner*, 257 Mass. 409, where at page 411 the court said, "That order presents no error in the circumstances here

disclosed. 'The policy of the law requires that litigation be terminated within a reasonable time and not protracted at the mere option of the parties,' or of one of them. . . . *Boston Bar Association* v. *Casey*, 227 Mass. 46, 48-49. . . . The court has power to protect its records from irrelevant, unimportant or superfluous papers and to take rational steps to end litigation. This order was directed to that end and was warranted." Because of what was said in the order of the full court dismissing case No. 11458 we do not consider other contentions of the petitioner.

Exceptions overruled.

FILED
MAY 9 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 694

DAVID RINES, individually and as administrator of Estate of Lucy L. Rines, Petitioner to Establish the Truth of Exceptions,

Appellant.

REPLY BRIEF ON BEHALF OF THE APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 694

DAVID RINES, Individually and as administrator of Estate of Lucy L. Rines, Petitioner to Establish the Truth of Exceptions,

Appellant.

REPLY BRIEF ON BEHALF OF THE APPELLANT

The appellant has asked this Court to pass upon his contention that, in dismissing two of his four Petitions to Establish the Truth of Exceptions, namely, the exceptions contained in his original bill of exceptions and the exceptions contained in his "Second Substitute Consolidated Bill of Exceptions", the Supreme Judicial Court for the Commonwealth of Massachusetts has violated his rights under the Fourteenth Amendment to the Constitution of the United States.

Several Statements on Page 2 of the Motion to Dismiss

In lines 2 and 3 of page 2 of the motion to dismiss, the appellees term the appellant's statement, at page 7 of the Jurisdictional Statement, "inaccurate". That statement is thoroughly accurate, though abbreviated. If this Court should desire a complete account, it may be found in the appellant's verified original Petition for a Writ of Mandamus (on file as part of the record, in this Court, of these

appeals) in *Rines v. Justices of the Superior Court,* 330 Mass. 368, 113 N. E. 2d 817, appeals dismissed for the want of a substantial federal question, 346 U. S. 919, rehearing denied, 347 U. S. 908, October Term, 1953, No. 433 and No. 434.

"The [two] cases whereof new trials were ordered", referred to in line 4 on the said page 2 of the motion to dismiss, can not afford the appellant the relief that he seeks. In the first place, as stated on page 25 of the Jurisdictional Statement, they were completely disposed of by directed verdicts prior to the orders for new trial, those directed verdicts were never set aside, despite the orders for new trial, and the Petitions to Establish the Truth of the Exceptions relating to them, No. 11,207 and No. 11,208, as stated on page 2 of the Jurisdictional Statement, were "dismissed on ground that exceptions do not *appear* meritorious" (italics supplied), without opportunity to present evidence, and without effective hearing. Those exceptions, therefore, are finally beyond any further consideration by the Supreme Judicial Court, and the appellant will never be afforded an opportunity to have reviewed the actions of the said judge of the Superior Court that gave rise to those exceptions. In the second place, the appellant has been denied the benefits of a jury trial as to fourteen additional cases, as well, and also as to additional counts of even those two cases.

On the said page 2 of their motion to dismiss, the appellees say also that the appellant has manifestly been unwilling to comply with statutes, rules of court and orders of the trial judge.

As evidenced by the fact that the appellant filed successively four bills of exceptions and a large number of

Petitions to Establish the Truth of Exceptions under the provisions of chapter 231, sections 113 and 117, it is obvious that he has endeavored, in good faith, to comply with the statutes.

The appellant complied fully with the rules of Court also. He filed his Petition to Establish the Truth of the Exceptions contained in his "Amended Second Substitute Consolidated Bill of Exceptions", as related on page 21 of the Jurisdictional Statement, within twenty days, as required by Rule 22 of the Rules for the Regulation of Practice before the Full Court. The Petition to Establish the Truth of the Exceptions contained in his original bill of exceptions was filed under the provisions of the statute, section 117, and, contrary to the allegation below the middle of page 8 of the brief for the appellees, it did not come under any rule of Court. It could not have come under any rule of Court because, as stated in the first paragraph on page 20 of the Jurisdictional Statement, the judge of the Superior Court never granted a hearing on the original bill of exceptions, and the Clerk of the Superior Court could not, therefore, under the provisions of Rule 74 of the Rules of the Superior Court, as explained on page 9 of the Jurisdictional Statement, notify the appellant of the allowance or disallowance of the original bill of exceptions. The Petition to Establish the Truth of the Exceptions contained in the "Second Substitute Consolidated Bill of Exceptions" also did not come under any rule of Court because, as explained in the second paragraph on page 20 of the Jurisdictional Statement, that "Second Substitute Consolidated Bill of Exceptions", like the original bill of exceptions, had never been either allowed or disallowed by means of a certificate in writing, and the appellant had no means of knowing that the Full Court was going unexpectedly to

rule that, in his particular case, contrary to the cases of all other litigants, it would be sufficient for the judge of the Superior Court to disallow the "Second Substitute Consolidated Bill of Exceptions" by merely refusing to take any action at all.

As for orders of the trial judge, the appellant complied completely with every order of the trial judge, except only that order which demanded that the appellant shall amend the "Second Substitute Consolidated Bill of Exceptions" into non-conformity with the truth. Even that order of the trial judge, as explained below the middle of page 18 of the Jurisdictional Statement, the appellant obeyed fully, insofar as so amending would render the "Amended Second Substitute Consolidated Bill of Exceptions" conform to the truth; and the only particular in which the appellant refused to obey that order was insofar as to do so would have rendered the "Amended Second Substitute Consolidated Bill of Exceptions" not in conformity with the truth and, furthermore, prejudicial by very reason of the fact of such non-conformity to the truth.

The Appellees Raise Points of Law Only

As stated in the first paragraph on page 20 of the Jurisdictional Statement, the dismissals of the Petitions to Establish the Truth of the Exceptions contained in both the original bill of exceptions and also the "Second Substitute Consolidated Bill of Exceptions", which latter was prepared in full compliance with an order of the judge of the Superior Court, were without opportunity to present evidence, and without effective hearing. It is for this reason that, as stated on pages 12-13 and 22-23 of the Jurisdictional Statement, the Full Court found it necessary to make findings of alleged fact upon pure assumption or

speculation, and without any evidence whatever to support the same.

These facts being admitted, all that the appellees can argue are questions of law, as follows:

I. That the appeals present no substantial federal question.

II. That no federal question sought to be reviewed was timely or properly raised.

III. That no federal question sought to be reviewed was expressly passed on by the State Court.

IV. That the judgment of the State Court rests upon an adequate non-federal basis.

I. Substantial Federal Questions Are Presented.

In the first place, as explained on page 8 of the Jurisdictional Statement, Petitions to Establish the Truth of Exceptions are original proceedings. The appellant was entitled to an opportunity to present evidence, and effectively to be heard, on those original proceedings.

Secondly, however, it is established law that, when appellate review is provided for by State practice, the safeguards of the Fourteenth Amendment must still be observed. *National Union of Marine Cooks v. Arnold*, 348 U. S. 37, *Frank v. Mangum*, 237 U. S. 309, 327. *Reetz v. Michigan*, 188 U. S. 505, at page 509, *Standard Oil Company of Indiana v. Missouri*, 224 U. S. 270, at page 287, *Lott v. Pittman*, 243 U. S. 588, at page 591, and *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U. S. 74, at page 80, cited by the appellees, are not in conflict with this established law.

Altogether aside from appellate review, moreover, the appellant was entitled to an opportunity to present evidence, and to be heard, in the Superior Court also, but the judge of the Superior Court, as related on page 17 of the Jurisdictional Statement, denied him those rights. As stated on page 25 of the Jurisdictional Statement, the said judge of the Superior Court later even excluded the appellant from a private locked hearing room. Attention is invited to the comment, by Mr. Justice Douglas, "An Almanac of Liberty", Doubleday & Company, Inc., 1954, page 20: "lawyers and judges who could operate behind closed doors might take short cuts they would not dare take publicly".

The appellant could not appeal to this Court from the refusal of the judge of the Superior Court to grant him a hearing. His only method of invoking the jurisdiction of this Court is through the medium of the present appeals. *Bush v. Kentucky,* 107 U. S. 110, 116.

The citation, *Lisenba v. California,* 314 U. S. 219, 226, does not support the argument of the appellees that the appellant has not been denied the equal protection of the laws. As one illustration, the appellant is entitled, in the Supreme Judicial Court, to the same hearing, before a Commissioner (see page 10 of the Jurisdictional Statement), that is accorded to other litigants, *Cochran v. Kansas,* 316 U. S. 255, 258. As a further illustration, the appellant is entitled to the same statutory hearing, on his bills of exceptions, in the Superior Court, that other litigants enjoy, but which the judge of the Superior Court has prevented the appellant from enjoying. There is a presumption that the judges of the Superior Court have always heretofore performed their statutory duty, imposed upon them by chapter 231, section 113, of the General Laws,

Tercentenary Edition, as described on page 9 of the Jurisdictional Statement, of examining exceptions, hearing the parties, determining whether the exceptions are conformable to the truth, and allowing them if they are so conformable. *Bush v. Kentucky*, 107 U. S. 110, *supra*, at page 121. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 190. See also *United States v. Chemical Foundation*, 272 U. S. 1, 16.

With respect to the statement, on page 5 of the brief for the appellees, that "the Jurisdictional Statement is devoid of suggestion of bias or prejudice in the conduct of the trial", attention is invited to paragraphs 11 to 14 of the before-mentioned verified original Petition for a Writ of Mandamus, reproduced herein, together with several of the prayers, as Appendix A.

On page 56 of the before-mentioned "An Almanac of Liberty", Mr. Justice Douglas has recognized the fact that this is not the first time that a judge of the Superior Court of the Commonweauth of Massachusetts has permitted his prejudice or partisanship to determine the issue of litigation before him.

With respect to whether the hostility, partiality, bias and prejudice of the said judge of the Superior Court were due, as suggested on page 5 of the brief for the appellees, to "the appellant's tactics imposed upon the judicial patience", attention is invited to the following passage, on page 8 of the appellant's affidavit accompanying the petition for rehearing:

> Despite the many provocations of the said judge of the Superior Court, the Honorable Paul G. Kirk, however, my attorneys and I have always conducted ourselves with respect toward him, as representing the Superior Court of this Commonwealth. The nearest to any possible sign of improper conduct on the part of any of us is the following, recorded on page 1049 of

the transcript, but omitted from all the bills of exceptions:

> (Disturbance because plaintiff thinks Mr. Powers is nodding to witness and telling him how to answer. Conference at the Bench between the Court and Mr. Schloss.)

That disturbance was caused by me, in protest against the said judge of the Superior Court taking no action to put a stop to the signalling by opposing counsel to the witness, and it was not participated in by my attorneys who, on the contrary, reproved me for the disturbance.

II. The Federal Questions Were Raised As Soon As It Was Possible To Do So.

As appears from pages 4 and 14 of the Jurisdictional Statement, there were no federal questions until they were raised by the Supreme Judicial Court itself.

On page 7 of the brief for the appellees, it is suggested that the appellant should have anticipated that the Supreme Judicial Court would decide his Petitions to Establish the Truth of his Exceptions on constitutionally defective grounds, based upon speculation or assumption as to which there was no evidence, and particularly after only a suspended argument, without even affording the appellant an opportunity to complete his argument.

In *Herndon v. Georgia,* 295 U. S. 441, it was argued that it could not have been anticipated that the Court would give a new construction to a statute. Could the appellant similarly have anticipated, for example, that the decisions cited at the bottom of page 20 of the Jurisdictional Statement would be ignored or, indeed, even overruled?

On pages 7 and 8 of the brief for the appellees, it is stated that, in *Lawrence v. State Tax Commission of Mississippi,* 286 U. S. 276, 282, "the constitutional issue was fully argued

to the State Supreme Court upon original hearing". The appellees do not explain, however, how that case can possibly apply in a situation where the appellant was not afforded any opportunity to present any evidence, and where such incomplete argument as was permitted, as already stated, was suspended, and was never resumed.

III. The Federal Questions Sought to be Reviewed Were Expressly Passed Upon by the State Court.

According to the certificate of the Chief Justice (page 5 of the Jurisdictional Statement), "all the Justices who took part in the original decisions" were "willing and anxious" not "to make a mistake or to be led astray by some misapprehension", and they therefore all actually "examined" the petition for rehearing. The Justices of the Full Court did, therefore, actually entertain the federal questions and did actually decide them. They decided, after examination, that they had not made any mistake, and that they had not been led astray by some misapprehension. These appeals, therefore, come within the authorities cited on page 6 of the Jurisdictional Statement.

IV. The Judgment of the State Court Does Not Rest Upon an Adequate Non-Federal Basis.

It has already been stated, page 3, *supra*, that the appellees are mistaken in their understanding that the original bill of exceptions was filed under the provisions of Rule 22 of the Rules for the Regulation of Practice before the Full Court. The appellant did not, therefore, violate this Rule 22. It has further been explained that, in order to dismiss the Petition To Establish the Truth of Exceptions contained in the "Second Substitute Consolidated Bill of Exceptions", it became necessary for the Full Court

to depart from the law, as applied to all other litigants, as demonstrated by the decisions at the bottom of page 20 of the Jurisdictional Statement, requiring a judge of the Superior Court to allow or disallow exceptions by means of a certificate in writing signed by him.

As explained at the bottom of page 22 and the top of page 23 of the Jurisdictional Statement, the appellant has never been permitted to offer evidence or to be heard upon the point as to whether the original bill of exceptions was or was not reduced to writing in a summary manner.

Conclusion

On page 27 of the Jurisdictional Statement, the comment is made that "There is consequently a graveyard full of buried Petitions To Establish The Truth of Exceptions."

Thorndike, petitioner, 257 Mass. 409, cited in the last paragraph of the decision annexed as Appendix A to the Motion to Dismiss, is only one of the very numerous voices from that graveyard.

A decision upon these appeals will advise litigants in the Courts of the Commonwealth of Massachusetts whether they should continue to try to obtain a hearing before the Full Court upon their Petitions To Establish The Truth of Exceptions or whether, on the other hand, they should resign themselves, without a hearing, to whatever fate may be decreed for them by the judge of the Superior Court, no matter how hostile, partial, biased and prejudiced he may be.

It is therefore respectfully submitted that the Supreme Court of the United States ought to note jurisdiction of these appeals, and afford the parties an opportunity to

brief and argue the merits of the substantial federal questions presented.

Respectfully submitted,

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Appendix A

The following are paragraphs 11 to 14, inclusive, of the verified original Petition For A Writ of Mandamus (which is part of the record, in this Court, of these appeals) referred to an page 7, *supra;*

11. Dr. Chase took the witness stand, to testify in behalf of your petitioner, the plaintiff in the said suits, on Wednesday, February 11, 1948. Thereupon, disregarding entirely his constitutional duty to administer justice with fairness and impartiality, the Honorable Paul G. Kirk began to display enmity, hostility, ill will, contempt, tyranny, bias and prejudice toward Dr. Chase; and, after a very short time, he peremptorily ruled that Dr. Chase was not qualified to give any medical testimony in the said suits. The reason that he formally assigned for this ruling, at the time, was two-fold: first, that Dr. Chase is only a general medical practitioner, and general medical practitioners can not possibly be possessed of the qualifications necessary for testifying with regard to the medical practices of the defendant physicians, who are specialists; and, secondly, because Dr. Chase has no knowledge of the similarity or lack of similarity of standards between New York and Boston. In chambers, however, as your petitioner alleges, upon information and belief, he indicated to counsel that his said ruling with respect to Dr. Chase was affected by the fact that Dr. Chase was not connected with leading hospitals. At the time that he thus disqualified Dr. Chase from testifying in the said suits, Dr. Chase was engaged in answering questions relating to the human circulatory system. The defendant, Dr. Armin Klein, called to the witness stand by Mr. Schloss in behalf of your petitioner, the plaintiff in the said suits, had previously testified that any first-year medical student is qualified to answer questions relating to the human circulatory system.

12. On Thursday, February 12, 1948, the next day after the said disqualification of Dr. Chase, however. the Honorable Paul G. Kirk permitted Dr. Chase to resume the witness stand, explaining to the jury that,

though his knowledge as to Dr. Chase's qualifications were no greater than on the previous day, he would allow Dr. Chase to testify to medical facts, of general or common knowledge within the medical profession; and that, as to matters beyond such medical facts, he would make further rulings, as the examination of Dr. Chase would progress. His judicial demeanor toward Dr. Chase remained unchanged thereafter, nevertheless, as the record in the said suits shows, and, throughout Dr. Chase's testimony, he repeatedly spoke sharply to Dr. Chase, he gave abrupt commands to Dr. Chase, he interrupted Dr. Chase's testimony, and he continually encouraged opposing counsel similarly to interrupt, and to offer all possible types of objection to Dr. Chase's testimony and to Dr. Chase's qualifications to give testimony.

13. On one occasion, Dr. Chase, solely from a reading of X-ray exhibits in evidence, which he had never previously seen, spontaneously gave testimony supporting the testimony of previous witnesses in behalf of the plaintiff as to the size and the shape of the before-mentioned gigantic grotesquely shaped plaster cast in which the defendant, Dr. Armin Klein, had encased your petitioner's wife, the said Lucy L. Rings; which testimony was contrary to previous testimony of the defendant, Dr. Armin Klein, and other witnesses in behalf of the defendants, who had described the said plaster cast as of very small dimensions and of not unusual shape. One of the attorneys for the defendants in the said suits then stated, in chambers, that Dr. Marius N. Smith-Peterson, a physician of world-wide renown, was prepared to testify that Dr. Chase's testimony as to what was disclosed by the said X-ray exhibits was false, whereupon the Honorable Paul G. Kirk ordered Dr. Chase to discontinue testifying, and permitted Dr. Marius N. Smith-Peterson to take the witness stand, instead. Just before thus ordering Dr. Chase to discontinue testifying, as your petitioner is informed and believes, and therefore avers, the Honorable Paul G. Kirk stated to counsel, in chambers, that he would hold Dr. Chase for perjury, in the event that

Dr. Smith-Peterson should testify, from his own reading of the said X-ray exhibits in evidence, that Dr. Chase had sworn falsely with respect to the size and the shape of the said plaster cast. On direct examination, Dr. Smith-Peterson, purporting to base his testimony upon a reading of the said X-ray exhibits in evidence, thereupon did testify contrary to the testimony of Dr. Chase, and in conformity with the previous testimony of the defendant, Dr. Armin Klein, and others who had testified in behalf of the defendants, as to the size and the shape of the said plaster cast. On cross-examination, however, Dr. Smith-Peterson was compelled to change his testimony, though not completely into agreement with the testimony of Dr. Chase. In contrast to his unjudicial disposition toward Dr. Chase, the Honorable Paul G. Kirk showed unbounded respect to, and consideration for, Dr. Smith-Peterson, as well as to the other very eminent physician, Dr. Arthur W. Allen, before mentioned, who later also testified in behalf of the defendants. He accordingly refused to permit your petitioner, by his attorney, Mr. Schloss, to cross-examine Dr. Smith-Peterson further than as bearing upon the said X-ray exhibits, thus preventing your petitioner, the plaintiff in the said suits, by his attorney, Mr. Schloss, from impeaching, and demonstrating bad faith on the part of Dr. Smith-Peterson, and from showing Dr. Smith-Peterson's bias and prejudice in favor of the medical profession, including the defendant doctors in the said suits, and against plaintiffs, including your petitioner, in medical-malpractice suits. In order to prove whether it was Dr. Chase or Dr. Smith-Peterson who had testified to the truth relating to the disclosure of the said X-ray exhibits, therefore, your petitioner thereupon offered the testimony of an engineer witness who had made precise engineering measurements of the said X-rays. The Honorable Paul G. Kirk refused, however, to permit the said engineer witness even to take the stand. He did not, nevertheless, order Dr. Chase to be committed for perjury, but, on the contrary, permitted Dr. Chase, though under great restrictions, to continue with his testimony, on Thursday, Friday and Monday, Febru-

ary 12, 13 and 16, 1948, until Dr. Chase's testimony was completed. In his charge to the jury, however, in order to aid the jury in weighing Dr. Chase's qualifications and Dr. Chase's testimony, he, by innuendo, called Dr. Chase a "charlatan", an "imposter" and a "quack".

14. After Dr. Chase took the witness stand, furthermore, the Honorable Paul G. Kirk, though previously conducting himself with courtesy and decorum toward your petitioner and your petitioner's said attorneys, Mr. Schloss and Mr. Cooch, thereupon began, and thereafter continued, to display toward them also the before described judicial attitude that he had adopted toward Dr. Chase; as when he arbitrarily and capriciously refused, both before and after his charge to the jury, to listen to argument with respect to the propriety of requested rulings for instructions to the jury, but heatedly ordered Mr. Cooch merely to state exceptions; and as when, just after the jury had retired to the jury room, to commence their deliberations, as your petitioner avers, on information and belief, Mr. Cooch visited him, in chambers, to invite his attention to the fact that the jury would need a very important exhibit, which had inadvertently been taken from the Court room by one of the attorneys for the said defendants, he refused, under considerable temper, to do anything about it, and ordered Mr. Cooch from the room. Later, the jury found for your petitioner in the said suits, Nos. 42030 and 42034, but, in the absence of the said very important exhibit, they were unable to assess the amount of the damages; whereupon, under instructions from the Honorable Paul G. Kirk, they were compelled to reverse their findings in favor of your petitioner, and to find, instead, for the defendants in the said suits, Nos. 42030 and 42034.

The following are among the prayers of that Petition for a Writ of Mandamus:

Your petitioner therefore prays:

* * *

2. That a writ of mandamus be issued out of this Court, requiring and directing the respondent Justices of the Superior Court, including the Honorable Paul G. Kirk, to take action upon the said motion to substitute the said Substitute Consolidated Bill of Exceptions and the said motion to approve the same;

3. For an order requiring the respondent Justices of the Superior Court, including the Honorable Paul G. Kirk, to hear your petitioner in connection with the prosecution of the said suits;

4. For an order requiring the respondent justice of the Superior Court, the Honorable Paul G. Kirk, to disqualify himself from any other and further participation in any manner in any of the said suits;

• • •

6. For such other and further relief as may be just.